January 11, 2013

Summary of Comments on
FR–5623–N–02 FHA Healthcare Facility Documents:
Revisions and Updates and Notice of Information Collection; 30-Day Notice

Background

This document provides a summary of the public comments received on a collection of HUD healthcare facility documents that were submitted for 30 days of public comment in accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA). Specifically, on November 21, 2012, consistent with the PRA, HUD published for comment for a period of 30 days, a notice advising that HUD was updating and revising a set of production, underwriting, asset management, closing, and other documents used in connection with transactions involving healthcare facilities, excluding hospitals, that are insured pursuant to section 232 of the National Housing Act (Section 232). (77 FR 69870)

That notice, FR-5623-N-02 FHA Healthcare Facility Documents: Revisions and Updates and Notice of Information Collection; 30-Day Notice, accompanied and explained a set of documents that were published for public comment, and are referred to collectively as the healthcare facility documents. These documents can be found on a HUD webpage:

http://portal.hud.gov/hudportal/HUD?src=/federal_housing_administration/healthcare_facilities/section_232/lean_processing_page/Proposed_232_documents

The particular healthcare documents published with the 30 Day Notice were based on a set of documents published May 3, 2012, with notice, FR- 5623-N-01- FHA Healthcare Facility Documents: Revisions and Updates and Notice of Information Collection; 60-Day Notice. (77 FR 26304)[1] That notice fulfilled the initial 60 day public notice requirements under PRA. The documents published with this 30 Day Notice include revisions made by HUD in response to the public comments received on documents that accompanied the 60 day notice.

II. The Commenters

The public comment period for this 30-Day Notice closed on December 21, 2012, and public comments were received from 5 commenters in response to HUD's notice. The commenters were the following:

Robert J. Duke	Surety & Fidelity Association of America	HUD-2012-0123-0002
Robert J. Duke	Surety & Fidelity Association of America	HUD-2012-0123-0003[2]
Lauren Rexroat	Capital Finance, LLC.	HUD-2012-0123-0007
Jack Fenigstein,	Fenigstein& Kaufman	HUD-2012-0123-0008
Gary Sever	Capital Funding, LLC	HUD-2012-0123-0010
Charles C. Bissinger, Jr.,	Vorys, Sater, Seymour and Pease, LLP	HUD-2012-0123-0011
Charles C. Bissinger, Jr.,	Vorys, Sater, Seymour and Pease, LLP	HUD-2012-0123-0012
Charles C. Bissinger, Jr.,	Vorys, Sater, Seymour and Pease, LLP	HUD-2012-0123-0013

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[1] The documents posted for review during the 60-day public comment period, commencing on May 3, 2012, were changes made to either the final updated multifamily rental project closing documents published on May 2, 2011 FR-5354-N-03 (76 FR 24507) or sample documents from the current Section 232 program.

[2] Comments 4, 5, 6, and 9 were transferred to another document folder, as the comments were on another Federal document on which comments were sought. The comments were inappropriately posted to this document folder.

III. About this Summary

This summary of comments presents the significant issues and questions related to the proposed rule raised by the commenters. The underlined headings present the issue or question, and are followed by a brief description of the commenter's/s reasoning. For ease of reference, commenters are identified in the summary by a number that is matched to the name of the commenter in an Appendix. The numbers are the last 4 numbers of the electronic rulemaking number used at www.regulations.gov. In instances where 1 commenter has filed several comments, e.g. general comments and redlined specific documents, the comments are designated under the first comment listing number for that commenter. All comments submitted are available and can be viewed at www.regulations.gov. Regulations.gov has posted the notice as the first document, so commenter number 1 is the Notice. Further, several comments (e.g. 4, 5, 6, and 9) were on another document and were not appropriately posted to this document folder document. Consequently, those comments are not addressed.

Please also note that commenters have varied their references to specific provisions in the documents; sometimes they refer to the language as sections, subsections, and paragraphs as sections, subsections or paragraphs. The references have been maintained in this document.

A. General Propositions:

This section of the summary includes summaries of "cross-cutting" issues that were emphasized in commenters' summaries. They are broken out separately from the document summary as they could be appropriate for a summary for the Notice.

Comment: HUD should provide guidance on "Program Obligations." A commenter stated that in many instances (e.g., the circumstances under which HUD will accept an operator that is not a single asset entity), there are no currently published handbooks, regulations or other guidance as to what the Program Obligations require.(#11) The commenter stated that they believe that it is critical that drafts of the new LEAN Guide and the new LEAN Closing Guide be made available as soon as possible so that lenders and borrowers who are submitting mortgage insurance applications that will close using the new form documents can assess and understand what will be required.

Comment: Establish Separate Forms of Operator Security Agreement, Operator Lease Addendum and Master Lease Addendum for Third-Party Operators. A commenter stated that the new documents impose significantly greater obligations and afford significantly fewer rights to operators. (#11) The commenter stated that while these changes will likely be acceptable to most identity-of-interest operators, they will raise major concerns for third-party operators. In general, they stated that they believed that the FHA lender and HUD benefit from having an owner/borrower who is unrelated to the operator since such an owner/borrower will be motivated to carefully monitor the operator's performance and to effectively enforce lease obligations in order to preserve its equity in a facility. Due to this alignment of interests, the commenter suggested that HUD should be willing to be somewhat more flexible in dealing with third-party operators. Specifically, the commenter recommended that HUD should establish separate forms (or alternative provisions within the new forms) of Operator Security Agreement, Operator Lease Addendum and Master Lease Addendum for use with third-party operators, and should allow field

counsel the discretion to approve changes to these forms on a case-by-case basis. The commenter stated that current HUD policy has required that third-party operators pledge their project-related assets (including their accounts receivable) to secure the operator's lease obligations. The commenter further stated that under the new forms, the third-party operator is required to pledge its assets to secure the borrower's loan obligations. This requirement alone is likely to have a significant adverse impact on the volume of loans for projects with third-party operators.

Comment: Long-Term Debt Service Reserve Treatment of Non-Profit Borrowers. The commenter recommended that HUD reconsider its proposed deviation from long-standing HUD policy with respect to non-profit borrowers. (#11) The commenter stated that it is counter to HUD's mission for HUD to treat non-profit borrowers disadvantageously solely because they are non-profit entities. The commenter stated that under the proposed new form of Borrower's Regulatory Agreement, all non-profit borrowers will be required to establish what amounts to a long-term debt service escrow merely because they are non-profit entities, even in those cases where, in all other respects, the non-profit is being treated the same as a for-profit borrower, not benefiting at all from its non-profit status.

Comment: Separate Forms of Assignment of Leases and Rents. The commenter stated that requiring Assignments of Leases and Rents from the Operator and, where applicable, the Master Tenant, is appropriate.(#11)The commenter stated that it was a bad idea to have these assignments of real property rights contained in the security agreements which grant security interests in personalty. The commenter recommended that the assignments should be in separate documents and appear on the checklists as separate items. The commenter stated that draft Assignment of Leases and Rents contained as an attachment to the Operator Security Agreement is a good starting point, but should be improved to include more specifics on events of default, remedies, and standard language that one would normally see in a free standing Assignment of Leases and Rents. The commenter stated that for ease in drafting, a lot of this language could be borrowed from the Borrower's Security Instrument.

Comment: Master Tenant Security Agreement and Master Tenant Regulatory Agreement. The commenter suggested that the Master Tenant Security Agreement and Master Tenant Regulatory Agreement be carefully conformed to the corresponding operator forms, including the changes that they reproposed to the operator forms. (#11)

Comment: Lender's Certificate. The commenter stated that it appears that HUD did not republish the proposed form of Lender’s Certificate, which they believed to have been an inadvertent oversight. (#11)The commenter included in their comments the comments submitted by the ABA in July 2012, together with a computer-comparison showing the ABA-proposed changes. The commenter stated that there are four sections that warrant further revisions, and noted those proposed further revisions in their detailed comments.

Comment: HUD should differentiate between Affiliated and Non-Affiliated Operators. A commenter stated that HUD must differentiate between operators who have an “Identity of Interest” with the HUD borrower (an “affiliated operator”) and operators who have no Identity of Interest with the HUD borrower (an “unaffiliated operator”)(#8). The commenter stated that an affiliated operator will be willing to sign almost any document required by HUD if it would enable the borrower to obtain its

desired HUD-insured financing. The commenter stated that a non-affiliated operator will be extraordinarily reluctant to do any of those things as typically, a non-affiliated operator would have little, if any, incentive to subject itself and its assets to its landlord's loan liabilities. The commenter further stated that in the overall majority of situations, the non-affiliated operator receives no benefits from the fact that its landlord has HUD-insured financing, as it negotiates the economic terms of its lease with its third-party landlord and it fully expects that if it performs its obligations under its lease it shall have the ongoing right to operate its business. The commenter stated that these issues would be most pronounced for the Non-Affiliated Operators in the Security Agreements required of the Master Tenant and of the Operator, the Master Tenant and Operator Regulatory Agreements, and the Subordination, Non-Disturbance and Attornment (SNDA).

The commenter stated that HUD has allowed for the indirect grant of a security interest in the non-affiliated operator's assets through the following methodology, which indirectly grants a lien to the lender. The nonaffiliated operator grants its landlord a security interest in its assets to secure its obligations to the landlord under its lease, and it will be willing to allow the landlord to assign that security interest to HUD as collateral for the loan. Because HUD gets an assignment of the subject lease as collateral for the loan and under the lease the tenant has provided a security interest in all its assets to the landlord, should the landlord default on the loan, HUD can step into the landlord's shoes and exercise the landlord's remedies against the non-affiliated operator if it is in default under its lease. The commenter stated that at the end of the day, if the loan default is attributable to the tenant's breach of its lease obligations, the FHA lender and HUD can foreclose on the tenant's assets and ultimately enjoy the same rights as they otherwise would have had the tenant granted a direct security interest to the FHA lender and HUD in the tenant's assets.

Comment: Project Operating Deficiencies, as defined in various Regulatory Agreements and the SNDA must not, by themselves, be deemed "Events of Default" entitling the FHA lender or HUD to terminate an Operator's Lease. (Regulatory Agreement) A commenter stated that FHA lenders experienced significant objections from portfolio operators with respect to the "project operating deficiencies" provisions included in section 6 of the SNDA form currently in use. (#8) The commenter stated that the concept of HUD appointing, or causing an operator to appoint, a consultant in the event of a Project Operating Deficiency was included in that SNDA form when HUD was looking for an interim remedy or right to address facility problems prior to their mushrooming in to a "Material Risk of Termination." The commenter stated that their insertion into the Regulatory Agreement in essence makes them non-waiveable and will in all likelihood result in the unwillingness of major operators to subject themselves to those requirements by cooperating with their landlords in obtaining HUD-insured financing. The commenter stated that this is the case not only for non-affiliated operators but also for affiliated operators.

The commenter stated that there should be no subjective determinants of what constitutes a "Project Operating Deficiency" and though a "Project Operating Deficiency" may occur, unless the applicable lease specifically defines the event or occurrence that transpired as an "Event of Default" under the lease, HUD cannot mandate that the occurrence of such events constitutes an Event of Default entitling it to terminate a lease or replace an operator.

The commenter recommended that HUD allow an operator that is otherwise paying rent under the lease, maintaining its "Permits and Approvals" without a "Material Risk of Termination" to continue to operate and address its problems.

Comment: Revise Time Frames for Cure Rights and Cure Periods. A commenter recommended that HUD allow reasonable time frames for curing "Events of Default" under the HUD Loan Documents and the SNDA. (#8) The commenter stated that where a borrower or operator is granted a 30 day cure period, as a matter of course, that 30 day cure period should be extended so long as the defaulting party commences the cure within 30 days and diligently pursues the cure to completion. The commenter stated that a limitation on that extended cure period for a "Material Risk of Termination" of "Permits and Approvals" or a payment default however is reasonable.

Comment: Specify in the documents that HUD and the lender should not exercise their rights and remedies under the loan documents if a default is cured. The commenter also recommended that the FHA lender's rights, or HUD's rights, to exercise their rights and remedies under the HUD loan documents upon the occurrence of the Event of Default should cease if the Event of Default is cured.(#8) The commenter stated that HUD did not cover that concept in any of the loan documents.

Comment: Require the FHA Lender to sign the agreements. A commenter stated that to the extent a HUD Loan Document imposes affirmative obligations upon a party (such as the FHA lender or HUD), those provisions in the subject document are meaningless unless the party who has such affirmative obligations in fact executes that Loan Document. (#8) The commenter stated that provisions in the Security Instrument or the Security Agreements stating that the "Lender will do this or the Lender will do that" are meaningless unless the FHA Lender is a signatory to those documents.

Comment: Make the lender a Third-Party Beneficiary in the Regulatory Agreements. A commenter stated that the FHA lender should be a third-party beneficiary of Borrowers, Master Tenants, and/or operators' obligations under their respective Regulatory Agreements. (#8) The commenter stated that HUD could limit their abilities to exercise those third-party beneficiary rights, but they should be provided to the FHA lender with that proviso. The commenter stated that this is particularly significant in the Borrower's Regulatory Agreement where principals of the borrower may have personal liability for certain "Bad Boy" breaches of the HUD Loan Documents. The commenter stated that the ability of the FHA lender to exercise HUD's rights in those limited situations will benefit HUD because it gives the FHA lender an alternative recovery source other than assigning the FHA Loan to HUD.

Comment: Require Electronic Filing. A commenter stated that they respectfully disagreed with the proposal that lenders shall include paper HUD Form 2530s Previous Participation Certificates in the application packages.(# 10) The commenter stated that it had become proficient in the electronic APPS process and felt that this is the process is the most effective and efficient. In including paper certifications as is proposed, attorneys and borrowers attempt to propose revisions to the document. The commenter stated that they believed that a certification where changes can be made should not be used; as if the certification is completed electronically, this cannot be done. In conclusion, they stated that that paper

2530s should not be allowed and all Lenders should learn the electronic system that has been in place for several years.

Defaults: General Comments. A commenter stated that they believed that any default of either the Mortgagor or Operator Regulatory Agreement should result in a default of the respective Security Agreement or Mortgage/Deed of Trust.(#10) This would provide the lender with the same enforcement rights as HUD. This provides lenders with increased ability to remedy defaults through various methods in order to avoid assignment to HUD.

B. Document Specific Comments

This section of the summary contains the comments related to specific documents.

LENDER NARRATIVES

232/223(a)(7) Lender Narrative (HUD-9001-ORCF)

Comment: Purpose of Adding Real Estate Assessment Center (REAC) scores: The commenter stated that they did not understand why the last REAC score being added to the narrative. (#10) The commenter stated that because REAC is being discontinued for skilled nursing facilities, the last REAC score is moot. Additionally, many of the REAC scores may be several years old, especially as time passes following the discontinuation of REAC.

Comment: Eliminate a Duplication in the Form; Page 11, Question #1 in the Occupancy section. A commenter stated that the question asks if the lender is requesting an increase to the loan term. (#10) This is addressed on page 8 in the Risk Factors section, and thus this question is redundant.

232/223(f) Refinance Lender Narrative (HUD_9002-ORCF)

Comment Revise Program Eligibility Page 13, Question #6 (Redline). A commenter stated that the question asks if there are floodways or coastal high hazard areas, other than incidental portions, located onsite.(#10) The commenter stated that they did not understand why the question references “other than incidental portions”. Based on previous transactions and conversations with HUD, according to the regulations, HUD cannot insure any loan that has any portion of a floodway on the parcel. The commenter stated that this question is very misleading and implies that a project can be insured if there is an incidental portion of a floodway on it, when in fact it cannot.

Comment: State Historic Preservation Office (SHPO) Clearance Page 50, Question #2 (Redline). A commenter stated that this question asks if the project involves repairs, construction, or ground disturbance; if the answer is yes, then a SHPO letter is required. (#10) The commenter stated that it is unclear if a SHPO letter will be required for simple repairs listed in the Project Capital Needs Assessments PCNA, such as paving a parking lot, fence installation, correcting trip hazards, etc. That is

not the understanding of the commenter regarding when a letter is required. The commenter stated that the verbiage is somewhat vague and they believed that more detailed language would clarify the question.

Comment: Flood Plain section**:** Page 51, Question #1 (Redline). A commenter stated that this question asks if the community participates in the National Flood Insurance Program; if the answer is yes, an explanation is required. (#10) The commenter stated that they believed the intent of the question is to request an explanation if the community no longer participates in the National Flood Insurance Program. As such the commenter stated that they believed the question should be revised so that an explanation is required if the answer is "No".

Comment: Revise the Lease Payment Analysis (Pages80 and 81). A commenter asked why the old Lease Payment Analysis chart was still in the narrative as this is no longer how the lease payment is calculated. (#10)

CONSTRUCTION DOCUMENTS

Lender Certification for New Construction Cost Certifications: (HUD-91129-ORCF)

Comment: Introduction: Limit the Lender's certification to the Lender's knowledge. A commenter stated that the certification by the lender should be based on the lender's knowledge. (#8) For example, the lender may not have knowledge of a relationship between the general contractor and borrower that would require a cost certification by the general contractor or a relationship that would require cost certification by a subcontractor.

Comment: Change "Mortgagor "to "Borrower.'' A commenter stated that references to "Mortgagor" were changed to "Borrower". (#11) The commenter stated that HUD should note that references to Form HUD-92330, is Mortgagor's Certificate of Actual Cost. The commenter questioned whether these references need to be changed to reflect a new form number and/or name?

Comment: Remove the Requirement for an Underwriter Signature. A commenter stated that HUD should not require that the underwriter of a loan to sign this form.(#11) The commenter stated that in the period of time between original underwriting and submission of cost certification, the original underwriter may have died, retired, lost his/her underwriter's "license," changed jobs, etc. Also, the commenter stated that if the loan has been assigned (either before or after initial closing), the "new" lender should be responsible for the cost certification review (and should have access to the information – primarily the HUD forms 92264, 92264-A and 2328 – sufficient to compare the actual costs to underwritten costs).

Request for Permission to Commence Construction Prior to Initial Endorsement (HUD-92415-ORCF)

Comment: The form should reflect HUD's two-Stage Processing Procedure. A commenter stated that paragraph 6, similar to paragraph 11, should recognize HUD's two stage processing procedures. (#11).

Comment: Delete the Requirement that the Borrower should hold title to the land. A commenter stated that paragraph 10 should be revised as there is no logical reason to require that the proposed borrower hold title to the land as a condition of approving an early start. (#11) The commenter stated that if a ground lease is involved, it is quite possible that HUD will not have reviewed or approved the ground lease prior to the early start.

Escrow Agreement for Operating Deficits (HUD–92476B–ORCF)

Comment: Calculate the Debt Service Coverage Ratio on Actual performance: A commenter recommended that the determination of a debt service coverage ratio be made without regard to any operating lease, master lease, or sublease so that the ratio is calculated based on actual performance of the facility. (#11)

Request for Endorsement of Credit Instrument& Certificate of Lender, Borrower & General Contractor Section 232 (HUD-92455-ORCF)

Comments: Certificate of Lender:

Lender Submissions and Representations

Comment: Delete the Reference to the Security Agreement in section I.A.2. A commenter stated that under the new form documents, the Security Agreement for the Borrower is part of the Borrower's Security Instrument and is no longer a separate security instrument. The reference should be deleted. (#11)

Comment: Restore the term “Premium” to the Document Sections I.A.16 and I.D.5. HUD changed the word "premium" to "penalty" in several places in these Sections. (#11) The proper term to use in these sections is "premium." The term "premium" (and not "penalty") is used in the form of Healthcare Facility Note, as well as in the Note and Request for Endorsement forms for the Multifamily program adopted in 2011. The commenter stated that there are concerns about courts enforcing a "penalty" that may not apply to enforcement of a "premium." The commenter stated that the reference to "penalty" in the parenthetical in Subsection 16 is erroneous, since the source of funds would be a "premium" (not a "penalty") from the sale of the Ginnie Mae securities.

Comment: Escrows and Deposits held by Lender

Comment: Section I.C.1.(c). Delete the Requirement to Attach an Escrow Agreement. A commenter stated that the escrow agreements are listed as separate checklist items on the closing checklists and are delivered as separate documents at the closing. (#11) Requiring the attachment of an escrow agreement to the Request for Evidence (RFE) is unnecessary and inefficient.

Comment: Sections I.C.1.(d) and (e).Reserve for Replacement and Residual Receipts: Delete the Reference to § 223(a)(7). A commenter recommended deletion of the phrase "For 223(a)(7) transactions" since replacement reserve and/or residual receipts could also be transferred in § 223(f) loan transactions and the form is set up to "check the box" where applicable.(#11)

Comment Sections I.C.5 and 7. Revise the Requirements for Deposits for Reserves for Replacements and Long Term Debt Service Reserves. A commenter recommended clarifying changes to conform paragraphs 5 and 7 to the language in paragraph 6.(#11) The commenter stated that obligations of, or instruments fully guaranteed as to principal, [by] the United States are permitted investments but are not "held in accounts insured or guaranteed by a federal agency."

Comment: Specify that the paragraph relates to the long term debt service reserve. A commenter stated that paragraph 7 should relate to the "long-term" debt service reserve. (#11) The commenter stated that regular "short term" debt service reserve escrows will be governed by the Escrow Agreement for Operating Deficit which is set forth in section I.C.3 and should be governed by the rules applicable to other typical escrows, such as operating deficit reserve escrows.

Comment: Section D: Certifications, Agreements and Acknowledgements:

Comment I.D.1. Revise the language to account for the manner in which Bond Payments are made. A commenter stated that amounts paid to third parties such as bond issuers, underwriters and bond counsel are not, technically, "paid over to the permanent lender." (#11) However, such amounts are not refundable if a loan fails to reach final closing, are not "held for the account of borrower" and cannot be subject to "HUD's control and direction in the event of a claim . . . " The commenter stated that typically, all or a portion of the costs of issuance are paid from sources other than loan proceeds. The commenter recommended modifying clause (e) accordingly.

Comment: Revise the Permit Language to Recognize that Operators Obtain Permits. Section I.D.10. A commenter recommended that changes be made to recognize that permits, approvals, etc. required to own and operate the project will often be obtained by the operator (or perhaps, others if, for example, services such as food or pharmacy are contracted to third parties).(#11) The commenter further recommended that changes be proposed to recognize that some of the required licenses, etc. will not be available at closing (e.g., in the case of a transfer, a new license may not be available until after closing). In addition, the commenter recommended that the last sentence of this section be revised to clarify that the exhibit is to contain a list of all such approvals, permits, etc. and to specifically identify approvals, etc. that are to be obtained after closing.

Escrow Agreement for Working Capital (HUD-9412-ORCF)

Comment: Revise to consider the performance of the Project. A commenter recommended revisions to recognize the performance of the project rather than the performance of the operator of borrower. (#11)

ADDITIONAL ORCF DOCUMENTS

Addendum to Operating Lease (HUD-91116-ORCF)

General Comment Regarding Third Party Operators. A commenter stated that they believed that a separate form of Addendum should be developed for third party operators or that HUD field counsel should be given the authority to negotiate changes to the Addendum for projects with third party operators. (#11)

HUD Requirements

Comment: Compliance with Program Obligations

Comment: Revise the section to require Operators to Comply with Program Obligations to the extent the Program Obligations are applicable to the Operator and/or its lease. A commenter stated that non-affiliated operators have major difficulties in giving any kind of warranties or representations that HUD loan documents are enforceable, or that they are bound by all terms and provisions of their landlord's loan documents. (#8) The commenter stated that the operators are being asked in section 2, Compliance with Program Obligations", to agree that the Operator Lease and the Addendum "conform to the Loan Documents". The commenter stated that operators will be unwilling to spend thousands of dollars for their attorneys to review the "HUD Loan Documents" in order to reach a level of comfort to state that they so comply, and suggested that it would be sufficient to simply have the lessee agree to comply with Program Obligations to the extent the Program Obligations are applicable to the operator and/or its lease.

Comment: Delete Irrelevant Definitions Section 1 – Definitions. A commenter recommended deleting the definitions of Material Term, Subsidiary Transfer and Transfer since those terms are no longer found in the Addendum.

Comment: Revise the section to restore the reference to assigning the Operator Lease as security for the loan. A commenter recommended that in section 2(a), in the second sentence, HUD should restore the reference that the Operator Lease is being assigned to the lender and HUD by the borrower as security for the loan. (#8) The commenter recommended that the last sentence of that paragraph be deleted as surplusage; on the grounds that it will cause heartburn to a lessee and that the concept is already covered in the previous language.

Revise section 2 paragraph (b) for "Program Obligations". A commenter stated that the paragraph will also be problematical to the non-Affiliated Operator. (#8) The commenter stated that an

operator will be willing to say that it will comply with Program Obligations applicable to lessees, and that to the extent the lease is inconsistent with the Operator's Regulatory Agreement, the terms and provisions of the Regulatory Agreement shall be controlling. The commenter stated that it is unfair and unnecessary to make the operator drill into all of the HUD loan documents to be able to sign the HUD Addendum.

Comment: Revise section 2 paragraph (c) for "Program Obligations". The commenter recommended that the last sentence of section 2(c) should be revised to read as follows (#8):

> "Lessee shall cooperate with Lessor and any lenders processing additional loans to Lessor at no material cost to Lessee. Lessee shall not be obligated to execute any documentation that materially increases its economic obligations under its lease after its Lessor's HUD Loan has closed nor materially modify its lease to the extent such modification will have a material adverse effect on Lessee and its operations."

The commenter stated that the problem with the language as drafted is a concern lessees will have that "blanket cooperation" will necessitate them to enter agreements they never contemplated initially and subject themselves to economic burdens or disadvantages that, had they known them at inception, would have militated against their entering into a lease transaction at all.

Comment: Revise Section 4, "Ownership of FF&E and Transfer of Personal Property." to reflect Operator Personalty. The commenter recommended revising section 4. (#8) The commenter stated that from a policy perspective, all FF&E at a facility necessary for licensing, certification, or operations, should be the personal property of the lessor, with exceptions for office equipment, computers, and perhaps certain artwork and furnishings. (#8) The commenter recommended suggested language that was provided in their June 29, 2012 submittal for inclusion in section 4 of the Addendum.

Comment: Revise the language in Section 5 Payments paragraph (a) regarding annual rent adjustments. The commenter recommended substituting in paragraph (a) "to maintain the veracity of this Section" should be changed to read "to conform to the requirements of this Section."(#8)

Comment: Revise Section 6 Operators Regulatory Agreement and Operator's Security Agreement. A commenter stated that references in section 6 regarding lessee's obligation to execute the Operator Security Agreement need to be modified to conform with the comments with respect to the problems of the Operator Security Agreement in a Non-Affiliated Operator scenario.(#8). Another commenter recommended a deletion as to account for leases entered into after closing in connection with a change in Operator. (#11)

Comment: Revise Section 13, "Termination of the Operator Lease" for Non-Affiliated Operators. A commenter asked what lessee will agree to the termination of its lease on HUD's request. (#10) The commenter stated that should only happen if there is an uncured material Event of Default that is

continuing. The commenter stated that this section, as drafted, is Draconian and, candidly, frightening, to any Non-Affiliated Operator. (#10)

Comment: Add a Cure Extension. A commenter suggested adding a cure extension clause in section 13(iii).”(#8)

Comment: Limit Master Lease Transactions to forestall Minor Ownership changes to avoid commonality. HUD cannot require that a Master Lease be entered into unless there is affiliated/common ownership among the facility landlords, common ownership among the Master Tenants and all of the Subtenant/Operators, and a common lender to all of the applicable borrowers.(#8) If a borrower seeks to “game” the system by making minor ownership changes to avoid commonality of ownership, or shops among lenders to avoid commonality, then HUD should not approve proposed HUD Loans to that borrower group when and as they submit subsequent loan applications.

Comment: Revise for Special Purpose Entities. Section 18. A commenter stated that many operators are not special purpose entities. (#11) The commenter stated that the regulations contemplated that operators that are not special purpose entities may be permitted (at least in certain circumstances) under Program Obligations.

Additional Sections. The commenter also noted several sections in the Master Lease Addendum that would seem to be of equal application to the Operator Lease Addendum.

Survey Instructions and Borrower’s Certification (HUD-91111-ORCF)

Comment: Use the FEMA Definitions. A commenter stated that FEMA uses the defined term "Special Flood Hazard Area". (#11) The commenter stated that the current FEMA definitions of the various Flood Zones refer to 1-percent-annual-chance flood and 0.2-percent-annual-chance flood rather than 100-year and 500-year floods. For consistency and clarity, the commenter stated that they believed the terms and definitions used by FEMA should be used.

Healthcare Regulatory Agreement Borrower (HUD 92466-ORCF)

Comment: Modify the Borrower’s Regulatory Agreement to clarity that non-profits need not establish a long-term debt service reserve. Under the proposed new form of Borrower's Regulatory Agreement, all non-profit borrowers will be required to establish what amounts to a long-term debt service escrow merely because they are non-profit entities, even in those cases where, in all other respects, the non-profit is being treated the same as a for-profit borrower, not benefiting at all from its non-profit status. (#11)

Comment: Revise the Definition of "Principal". A commenter stated that this definition does not include any discussion of other legal forms beside a limited liability company. (#10) Other legal forms such as, but not limited to, general partnerships, subchapter S-corporations, and limited partnerships, should be included.

Include Non-Profit Borrowers. A commenter stated that several changes made by HUD between the May 2012 draft and November 2012 relate to the treatment of non-profit borrowers. (#11)Although the commenter stated that they limited their comments to specific changes in language, they stated their belief that it is inappropriate to deny non-profit borrowers rights that are available to for-profit borrowers solely due to their non-profit status. (#11)

Occupancy Section 7. For projects involving refinancing, occupancy will have occurred without HUD's prior written consent. (#11) The revisions in the last sentence of section 7 conform the provision to actual experiences to remove the consent.

Financial Accounting: Section 12. Clarify the Coverage of Reasonable Operating Expenses. A commenter stated that expenditures may include amounts such as capital items or payments of debt service that are not Reasonable Operating Expenses. (#11) HUD's interest here is that the financial records demonstrate that expenditures be permitted under Program Obligations.

Comment: Section 16 Distributions. Limit the Obligation to restore Negative Surplus Cash. With respect to Section 16d, a commenter recommended that the obligation to restore a negative surplus cash situation be limited to the amount required to eliminate the deficiency (e.g., if $100.00 is distributed and a $1.00 negative surplus cash position results, then a $1.00 payment should rectify the situation).(#11)

Comment: Add a designee for Distributions to Include Third Party Operators. A commenter recommended revising Paragraph 16(e) to include the phrase "or its designee" to the last sentence. (#11)The commenter stated that they believed that to the extent that third party operators are contributing to reserves, they should receive whatever portion was previously negotiated.

Comment: Eliminate the Requirement for HUD Advance Approval of Repayment and Advances. Sections 18b and 18c. A commenter stated that requiring advance HUD approval of interest on advances and HUD approval of repayment of advances is unnecessary and could be counterproductive. (#11) The commenter stated that so long as payments of interest and repayments of advances are being made from permitted distributions, it should not be objectionable to HUD. The commenter stated that requiring advance approvals could discourage or delay investors from providing needed working capital as well as create unnecessary burdens on HUD asset management staff. (#11)

Comment: Section 26 Operator: Cooperation in Change of Operator. Section 26d. Clause (ii). A commenter stated that the clause is unnecessary in light of all of the other rights and remedies available to HUD. Borrowers will perceive this clause as a vague, broad power that HUD may enforce arbitrarily. (#11) Another commenter stated that this line should be removed from the document in its entirety. This language yields HUD too much subjectivity in determining financial viability of the project, thus creating too much risk for the borrower. (#10)

Comment: Include a provision to recognize that an Operator may Purchase a Facility. Section 26e. A commenter proposed to recognize that there may be circumstances where HUD may determine it is appropriate to consent to matters such as the grant to the operator of an option to purchase a facility. (#11) The commenter stated that this could be an important inducement for an operator to take over a struggling facility. The commenter proposed the deletion of clause (iii) since they knew of no reason why HUD's interests would be adversely affected by the characterization of a lease as other than an operating lease under generally accepted accounting principles. (#11)

Section 27 Personal Property: Security Interests.

Comment: Remove restrictions on an Operator Purchase. Page 26, Section 27 (ii). (Ave Note: This appears to be the Redlined copy and actually section 26.) A commenter recommended that this line be removed from the document in its entirety. (#11) The commenter stated that they believed the borrower has every right to negotiate a future sale with its existing arms-length tenant based on market conditions.

V. Actions Requiring the Prior Written Approval of HUD

Comment: Remove restrictions on an increase in the Lease Amount. Section 34: 5. (Page 30, Section 34 (n)(ii)): A commenter recommended that this line be removed from the document in its entirety.(#10) The commenter stated that they saw no reason to prevent any increase in the lease amount, as such an increase would further support the debt service obligations of the borrower.(#10)

Comment: Limit the Circumstances in which a Permit or Approval will create a Default. Section 36b.(i) The restriction of a Permit or Approval that does not prevent the cure of the facility for the Approved Use should not be a default (e.g. if a curb cut permit for an unneeded access point is lost due to a road widening or relocation, there should not be a default).(#11)

Comment: Permit the Lender to Take Action to Avoid Foreclosure. Delete the Page 32, Section 36 (c)(ii). The commenter stated that the provision, "…and thereupon proceed with foreclosure of the Borrower's Security Instrument and the exercise of other remedies available to Lender under the Loan Documents or at law or equity, or assign the Note…" should be revised or removed. The commenter stated their belief that the lender should have the opportunity to take another course of action to avoid

foreclosure, and that foreclosure should not be treated as an absolute course or remedying such a default. (#10)

Operator Security Agreement. (HUD-92323-ORCF)

Comment: HUD should provide an alternative form of Operator Security Agreement securing the Operator's obligations to its landlord under the lease with landlord, lender, and/or HUD designated as the secured parties. A commenter stated that a non-affiliated operator should not be obligated to sign an Operator Security Agreement in favor of the lender if it objects so long as it grants its Landlord a security interest in its assets as security for its obligations under the subject lease and that security interest is assigned by the Landlord to its lender as collateral for the Loan.(#8) The commenter recommended that HUD provide an alternative form of Operator Security Agreement securing the operator's obligations to its landlord under the lease with landlord, lender, and/or HUD designated as the secured parties (#8)

Specifically, the commenter recommended modifying Recital Paragraph B and section 1(a) and (b) for the Non-Affiliated Operator insofar as they reference that the Security Agreement is security for the "Obligations". The commenter recommended that "Obligations" be limited to the operator's obligations under the lease rather than borrower's obligations under the Loan Documents. (#8)

The commenter also stated that Recital Paragraph C has the operator acknowledging and agreeing that it benefits directly or indirectly from the making of the loan to borrower. The commenter stated that in the vast majority of circumstances, this is simply not the case. (#8)

General Comments – Third Party Operators. The requirement that the operator pledge its assets to secure the borrower's obligations under the Loan Documents, rather than to secure the operator's obligations under the Borrower-Operator Agreement will be a significant problem in cases involving third party (Non-IOI) operators. (#11)

Comment: Revise the Introductory Paragraph and Section 2(a)(vii) with Respect to Location under the Uniform Commercial Code (UCC) as it is not appropriate. A commenter recommended that the address of the operator for receipt of notices in accordance with section 17, not its "location" under the UCC, should be included in the introductory paragraph. The commenter stated that the "location" under the UCC can be stated elsewhere. (The commenter recommended that that be Exhibit C) and will normally just be the Operator's State of organization (unless the operator is a general partnership, a trust, a natural person or other "unregistered" entity). (#11)

Section 1 Security Interest: Setoff

Comment: Sections 1(b) and 1(c) – Healthcare Assets. Insert References to the Master Lease Documents. A commenter recommended inserting references to the Master Lease or Master Tenant in a

location that avoids moving words like "and" or "or" around. (#11)

Comment: Sections 1(d). Limit FHA's Security Interest in Licenses and Permits. A commenter recommended that the limitations on security interests, etc. should apply to all Healthcare Assets, including licenses, permits and approvals as the FHA loan transaction should not trigger violations of state licensing laws. (#11)

Comment: Delete the provision allowing the Lender to prohibit the operator from withdrawing from reserves or impounds. Paragraph (c) entitles a lender to refuse to allow withdrawals from reserves or impounds where a borrower is in default under its Loan Documents. A commenter stated that if the operator is not in default under its lease, this refusal is grossly unfair to the operator. (#8) The operator funded the impounds and/or reserves, is fully performing under its lease, and should not be penalized from utilizing those funds because of an Event of Default that it has not triggered or caused. (#8)

Section 2: Representations: General Covenants

Comment: Delete the reference to "Bulk Transfer. A commenter (#8) stated that the reference for a disclosure of a "Bulk Transfer" in the introductory paragraph of section 2 should be deleted; a transfer of nursing home operations is not a bulk sale under the UCC. The commenter stated that nursing home operators are not in the business of selling equipment or inventory so the provisions generally of Article 6 of the UCC have no application.

Comment: Deposit Account Requirements should be revised to limit a Control Agreement to Government Receivables. Commenters stated that paragraph (h), as drafted, is overly broad. The commenter stated that many banks where Government Receivables are deposited refuse to execute a Deposit Account Instruction Services Agreement ("DAISA") (#8,11) The commenters stated that HUD has acknowledged this issue in the past and has not mandated its use where banks have refused to provide it. The commenters stated that section 2(h) mandates that a DAISA be delivered which may be an impossibility.

The commenter stated that this paragraph, as drafted, mandates a Control Agreement (a "DACA") on all of the deposit accounts of operator. The commenters stated that implementation will impose a severe economic burden on an operator. The commenters stated that Exhibit C-1, referenced in section 2(h), should set forth the salient accounts that require a DACA. That should be limited to the account or accounts into which governmental receivables are swept and into which an operator is obligated to deposit its private pay, insurance, and HMO collections. If those funds are then swept into a general operating account, or swept to the AR lender, who in turn funds draws under the AR line to operating accounts, such other accounts should not be covered by DACAs

A commenter recommended adding a definition of "Deposit Accounts" that applies only to accounts that are required to be subject to a DACA or DAISA and then making conforming changes to the Agreement.(#11) The commenter stated that that they did not use the defined term for several references to "deposit accounts" as the commenter believed that those references should apply to all of the Operator's Capital accounts (although exceptions would be needed for accounts of operators that are not single asset entities).

Comment: Delete the requirements to attach the cash management structure (#10). In Section 2(xii**)** of the Operator Security Agreement, HUD is requiring that the operator's cash management structure be attached as an exhibit. (#10) It is inappropriate to require that the cash flow chart be attached to any document that could be recorded. An Operator's cash flow chart may contain confidential or sensitive information that is not appropriate to recorded in a public record. It opens the operator to various risks, including, but not limited to, fraud on the part of some third party attempting to use the account information, and litigation.

Comment: Require the Lender to sign the Security Agreement: The commenter stated that the penultimate sentence of paragraph (h) includes an affirmative covenant of the lender that "unless a default exists under this Agreement or the Loan Documents, lender will not provide notice under a DACA to the depositary bank…that lender is exercising rights of control in the deposit accounts."(#8) The commenter stated that for that covenant to be effective, the lender must be a signatory to the Security Agreement.

Comment: Include a materiality concept for Events of Default: A commenter stated that the triggering events in section 8 that comprise Events of Default, particularly in sections 8(b), (e), and (f) should include a materiality concept. (#8)

Comment: Add a Cure Extension Clause to the Events of Default: A commenter recommended that section 8 paragraph (e) include the following tag phrase:

> "…provided, however, so long as operator commences to cure the subject default and diligently pursues such cure to completion, the continuance of that default shall not constitute an Event of Default for purposes of this Agreement." (#8)

Section 15. Operations Transfer/Cooperation In Event of Borrower-Operator Agreement Termination

Comment: Provide for a transfer of Medicare and Medicaid agreements if an expiration or earlier termination of a Borrower-Operator Agreement. A commenter recommended that language be added in

this section to specify succession. (#8) The commenter recommended adding the following sentence in section 15, after the (very long) first sentence:

> "Operator shall further execute such documentation as may be required to transfer its Medicare and Medicaid provider agreements to the Successor."

Section 20, "Provisions Regarding Accounts Receivable Loans"

Comment: Make the section consistent with the Intercreditor Agreement. The commenter recommended that this section be reviewed and revised to make the provisions consistent with the form of Intercreditor Agreement ultimately used in any transaction. (#8) The commenter recommended that the provision, as drafted, needs to be flexible enough to accommodate the form of "Required Intercreditor Agreement" used in connection with any applicable AR Financing.

Comment: Section 20(b)(v) of the Operator Security Agreement should be deleted in its entirety. A commenter stated that an operator as borrower has no control over when or whether its AR loan is syndicated and therefore it is inappropriate to include the requirements set forth therein in an operator security agreement. (#10) The commenter stated that this is especially true for operators with pre-existing lines of credit. Furthermore, the requirements as set forth in the subsection are inappropriate requirements for HUD to impose on third parties. They are not reflective of how syndications or co-lending arrangements work and no AR lender or group of lenders will agree to those provisions. The commenter further stated that in Section 20(c) of the Operator Security Agreement, the Intercreditor Agreement should be considered a Loan Document for the reasons set forth above.

Comments: Revise Section 21 and Attachment 1 – Assignment of Leases and Rents.

Comment: Modify the Assignment of Lease Requirements for Specific Types of Transactions. A commenter stated that the Assignment of Leases and Rents should not be required where the borrower is the operator since the assignment of the borrower's rights with respect to leases and rents is covered by the Borrower's Security Instrument. (#11) The commenter further stated that in those instances where an Assignment of Leases and Rents is required, it should be a separate document included on the Closing Checklist. The commenter further stated that there is no point in attaching it as an exhibit to the Operator Security Agreement. The commenter recommended that confirming changes should be made to the Operating Lease Addendum and Regulatory Agreements to require the execution of an Assignment of Leases and Rents where applicable. The commenter further stated that the Assignment is missing customary provisions related to defaults, remedies and boilerplate provisions (such as jurisdiction and venue), much of which could be added using provisions of the Borrower's Security Instrument.

Attachment 1, "Assignment of Leases and Rents Rider"

Comment: Revise the Event of Default Clause to address the continuance of a Default. A commenter recommended that in section 2(c) the opening phrase of the second sentence be revised to read as follows: "Upon the occurrence and continuance of an Event of Default…" (#8)

MASTER LEASE DOCUMENTS

Master Tenant Security Agreement. (HUD- 92340-ORCF)(#8)

Comment: The relevant comments above with respect to the Operator Security Agreement to the extent the provisions in the two Agreements are duplicative, apply to this document. (#8)

General. A commenter suggested conforming changes. A commenter suggested changes to be consistent with the provisions of the Operator Security Agreement, HUD-92323-ORCF, including among other things, substituting the term "Secured Party" with "Lender". (#11)

Comment: Recitals: Revise Recital Paragraphs E and F to limit them to obligations of the Master Tenant under the Master Lease Documents, and not under the Loan Documents. The commenter stated that these two clauses of the recitals are problematical in a Non-Affiliated Operator scenario.(#8)The commenter stated that a Master Tenant generally does not benefit from the making of the loan to the borrower and will be unwilling to enter into a Security Agreement that secures the "Obligations" of the borrower under the loan documents.

Comment: Statement of Agreement: The commenter recommended that "Obligations" in the Statement of Agreement in paragraph 1(a) needs to be limited to the obligations of the Master Tenant under the Master Lease Documents, and not under the Loan Documents.(#8)

Comment: Statement of Agreement: The commenter stated that section 1 paragraph (b) will be unacceptable to an unaffiliated Master Tenant where it is in compliance with its obligations under the Master Lease. (#8) The commenter stated that it will expect that funds it has impounded, or that its subtenants have impounded, or deposits to reserves, can be utilized for their stated purposes rather than being retained by the lender.

Comment: Introductory Paragraph and Section 2(a)(vii) – Location under UCC. A commenter stated that the address of the Master Tenant for receipt of Notices in accordance with Section 17, not its "location" under the UCC, should be included in the introductory paragraph. (#11) The commenter stated that the "location" under the UCC can be stated elsewhere (they recommended Exhibit C) and will normally just be the Master Tenant's state of organization (unless the Master Tenant is a general partnership, a trust, a natural person or other "unregistered" entity).

Comment: Insert references to Master Documents Sections 1(b) and 1(c) – Healthcare Assets. A commenter recommended inserting where possible references to the Master Lease or Master Tenant in a location that avoids moving words like "and" or "or" around, consistent with the Operator Security Agreement. (#11)

Comment: Section 1(d) Limit the Interest in Security Interests. A commenter recommended that the limitations on security interests, etc. should apply to all healthcare assets, including licenses, permits and approvals as it would not be appropriate for the FHA loan transaction to trigger violations of state licensing laws. (#11)

Comment: Assignments of Leases and Rents: A commenter stated that an absolute and unconditional assignment to the lender of an operator's sublease generally conflicts with licensing laws in all 50 States. (#8) The commenter stated that a licensee needs a possessory interest in its facility, meaning it must have a lease or a sublease in place; if that lease or sublease is absolutely assigned, rather than collaterally assigned, that is a problem.

Comment: Assignment to a third party lender is not workable. A commenter stated that section 2 paragraph (b) requires the Master Tenant to assign all "Rents" to the lender as the Secured Party. (#8) The commenter stated that an unaffiliated Master Tenant will be willing to assign the same to its landlord to secure its obligations under its Master Lease, but not to a third-party lender to secure the borrowers' obligations under their respective loans.

Comment: Revise the language regarding secured party exercise of rights and remedies under subleases. A commenter stated that the provisions in section 2 paragraph (c) that allow the secured party to exercise all rights and remedies of the Master Tenant under its subleases, will be unpalatable where the Event of Default ties to loan obligations rather than lease obligations.(#8) The commenter further stated that the penultimate sentence in that section provides for termination of the exercise of rights by a Master Tenant upon the occurrence of an Event of Default; the commenter questioned what happens if that Event of Default is subsequently cured. The commenter stated that there is no provision for reinstating the Master Tenant's rights, powers, and authority under the subject leases.

Comment: Representations: General Covenants. A commenter stated that the introductory language in section 3 paragraph (a) does not work in an unaffiliated Master Tenant situation.(#8) The commenter stated that an unaffiliated Master Tenant has no interest in inducing HUD to consent to the proposed loan nor to the lender making the loan to its third-party landlord.

Comment: Representations: General Covenants. A commenter suggested deleting the references to a "Bulk Transfer" in Section 3(a)(vi).(#8) Presumably, the argument is similar to that in Section 2, that

nursing home operators are not in the business of selling equipment or inventory so the provisions generally of Article 6 of the UCC have no application.

Comment: Delete the reference to DAISA, DACAs and Government Receivables in General Covenants. A commenter stated that the provisions of this section in paragraph (j) dealing with government receivables accounts and related Deposit Account Instructions and Service Agreement (DAISAs) and Deposit Account Control Agreement (DACAs) should be deleted. (#8) The commenter stated that the Master Tenant is never the licensee nor the operator under any Master Lease scenario.

Section 3(h) – Deposit Accounts. A commenter stated that as currently drafted, section 3(h) significantly changes existing HUD policy regarding DACAs and DAISAs. Current HUD policy requires a DACA or DAISA only for those accounts of the Master Tenant which receive facility revenues either directly or as a result of a transfer from a government receivables account pursuant to a DAISA. A DACA is not currently required for other deposit accounts of the Master Tenant (such as a savings account, central disbursement accounts and accounts not related to the Project). A commenter recommended adding a definition of "Deposit Accounts" that applies only to accounts that are required to be subject to a DACA or DAISA and then making conforming changes to the Agreement. (#11) The commenter stated that they did not use the defined term for several references to "deposit accounts" as they believed that those references should apply to all of the Master Tenant's Capital accounts.

Comment: Limit the Event of Default. A commenter stated that in section 9, Event of Default the language should be revised to limit the obligation to a Master Tenant’s obligations under the Master Lease, and not the obligations of the borrower to its lender. (#8) Similarly, the commenter stated that in paragraph (b), HUD should delete references to the “Loan Documents” and any reference to the Borrower’s Regulatory Agreement. The commenter also suggested that HUD add the “Cure Extension Clause” to paragraph (c). The commenter further stated that because there are affirmative obligations of the lender under this Agreement, the lender should be included as a signatory.

Section 21 and Attachment 1 – Assignment of Leases and Rents.

Comment: Include standard language in the Assignment. A commenter stated that the Assignment is missing customary provisions related to defaults, remedies and boilerplate provisions (such as jurisdiction and venue), much of which could be added using provisions of the Borrower's Security Instrument. (#11) The commenter stated that the Assignment of Leases and Rents should be a separate document rather than in the body of the Security Agreement. The commenter stated that they perceived no reason to treat it differently than the way it is treated in the Operator Security Agreement. The commenter stated that additionally, it is customary to record an Assignment of Leases and Rent, but not to record a Security Agreement in the land records.

ASSET MANAGEMENT DOCUMENTS

Borrower's Certification –Full or Partial Completion of Non-Critical Repairs (HUD-92117-ORCF)

Comment: Modify for Alternative use. A commenter recommended adding a definitional paragraph which references the Firm Commitment and recommended modifications for certification prior to closing. (#11)

ACCOUNTS RECEIVABLE DOCUMENTS:

Intercreditor Agreement (for AR Financed Projects) (HUD-92322-ORCF)

General Comments: A commenter stated that as drafted, the Intercreditor Agreement (ICA) did not consistently use defined terms.(#11) The commenter stated that many of their recommended changes convert phrases to the corresponding defined terms or otherwise address terminology issues.

Comment: Publish the ICA as a "Guide" Document. A commenter stated that given that every transaction is unique and requires unique transaction documents, they strongly recommended that the ICA be published in final form as a "guide" document much as the forms of attorney opinions were published in the November 21, 2012 docket. (#7) While agreeing that a standardized form of ICA is appropriate for HUD transactions, the commenter stated that they believed publishing the ICA in guide form provides HUD with the appropriate flexibility to tailor the ICA to fit the unique circumstances of each transaction. The commenter recommended that ORCF provide written guidance regarding which provisions of the ICA are required and non-negotiable and which provisions may be tailored to accurately reflect a particular deal's terms.

Comment: Add Definitions for Approved Operators" or "Borrower Representative". Add definitions for "Approved Operators" or "Borrower Representatives" Paragraph 1.4: A commenter recommended adding optional definitions of "Approved Operators" or "Borrower Representative". (#11) The commenter stated that the operators of other HUD-Insured facilities may also be parties to the AR Loan Agreement. The use of these defined terms will be helpful in several places.

Comment: Define the ICA as an "AR Loan Document". A commenter stated that they do not understand why the ICA is not considered an AR Loan Document for purposes of the ICA.(#7) The commenter stated that most AR lenders' loan documents will provide that the ICA is actually a crucial loan document, borrowers' adherence to which is key for the AR lender's continued funding of the AR loan. The commenter recommended that the ICA be considered a "HUD Loan Document" for those same reasons. The commenter stated that each of the AR lenders and the HUD lender risk losing the AR borrower's non-compliance with a requirement of the ICA as a default under their respective loans if the ICA is not considered an "AR Loan Document" and a "HUD Loan Document."

Provide the AR Lender a Lien in the Definition of "AR Loan Obligations". A commenter stated that they do not understand why an AR lender may not have a lien, even if subordinate, on collateral other than the collateral as defined in the AR Lender Priority Collateral. (#7) The commenter stated that many AR lenders lend on the strength of a package of collateral that is much more inclusive than that set forth in the AR "Lender Priority Collateral" definition, even if they must take subordinate positions on such collateral. The commenter stated that if an AR lender is willing to accept the terms of the ICA and take a subordinate position on such collateral, it is unclear why HUD would not permit the same. The commenter stated that allowing an AR lender to take a subordinate position on such collateral does not harm HUD or the HUD lender's position vis-a-vis the project or its operations.

Comment: Delete the Reference to Real Estate: Paragraph 1.5: A commenter recommended deleting the reference to "deeds of trust, mortgages" since real estate is not typically collateral for an AR Loan. (#11)

Comment: Revise the Definition of "Cut Off Time". A commenter recommended a revision to the definition to clarify that the extension of the notice provided for therein, while perhaps consented to by HUD, is actually provided by the HUD lender, since HUD is not a party to the ICA and will not be providing the notices set forth therein. (#7)

Comment: Definition of "Deposit Accounts". A commenter recommended adding to the definition as follows (#7):

> "Deposit Accounts" shall mean any deposit account (a) holding proceeds of any accounts, (b) holding any cash of the Operator, (c) into which advances are funded, (d) for which a deposit account control agreement or equivalent document in favor of the AR Lender and approved by HUD, has been entered into, or (e) to the extent permitted by applicable law, for which a deposit account services and instruction agreement or equivalent document, approved by HUD, has been entered into, but excluding any deposit accounts established for the payment of lease costs."

Comment: Definition of "Facility". A commenter recommended deletion of the phrase "assisted living facility" as AR lenders generally do not make AR loans available to operators of assisted living facilities. (#7)

Comment: Definition of "HUD Loan Documents". A commenter recommended that the ICA actually be considered a HUD Loan Document. (#7)

Comment: Account for FHA Lender Roles: Paragraph 1.14. A commenter recommended that in cases where an AR Loan is put in place after closing of the HUD loan, the FHA lender then holding the HUD loan could be different than the lender who made the HUD loan.

Comment: Revise the Definition of "Lender Priority Collateral". Paragraph 1.12. A commenter recommended modifying the definition of "FHA Lender Priority Collateral" and making corresponding changes throughout the Agreement so that the term is used consistently and mirrors the term "AR Lender Priority Collateral".(#11)

Comment: Define "Material Term". A commenter recommended that the defined term "Material Term" be set forth in the ICA and that the form ICA not rely on the lease to provide that definition. Even if the ICA is published as a "guide" and not a required form, it is intended to be a document that sets forth all material terms required as between HUD and the AR lender. Each lender must know what is considered a "Material Term" for purposes of the ICA. (#7)

Comment: Define "Operator Regulatory Agreement". Paragraph 1.19. A commenter recommended adding a definition of Operator Regulatory Agreement. (#11) The commenter stated that this term is used multiple times in the provisions added from the prior form of Rider to Intercreditor Agreement ("Rider").

Comment: Add a definition of "Other Facilities." Paragraph 1.20. A commenter recommended adding a reference to the fact that the parties might amend the list of Other Facilities. (#11) The commenter also allowed for the possibility that "Other Facilities" could be so designated without amending each existing Intercreditor Agreement (it would be burdensome to amend ten, twenty or more separate agreements when dealing with each addition of a new facility to an AR Loan).

Comment: Revise the Definition of "Priority Obligations". A commenter stated that the concept of "Program Obligations" may be misplaced in this definition. (#7) The commenter stated that "Program Obligations", as that concept is used throughout HUD's proposed revised program documents, are generally not applicable to AR lenders. It was therefore their recommendation that this concept be incorporated in a different format in these documents.

Comment: Add a definition of "Program Obligations". Paragraph 1.24. The commenter recommended adding a definition of "Program Obligations" since that term is now used several places in the Intercreditor Agreement. (#11)

Comment: Revise the Definition of "Triggering Event". The commenter recommended that the term "Owner-Operator Agreement" be defined in this document or the terms "Lease" or "Master Lease" be used as appropriate in the ICA.(#7) The commenter stated that currently, the term "Owner-Operator Agreement" is not defined in the ICA.

2. Priorities

Comment: Revise Lender Priorities for Perfection. A commenter stated that paragraphs 2.1(b) and 2.2(b) should be revised to reflect subordination issues. The commenter recommended adding back the phrase "which is the subject of the unperfected, unenforceable or voided security interest" was because they believed that any priority collateral not affected by the perfection issues should remain subject to the subordination provisions of the Intercreditor Agreement.(#11)

Comment: Lender Priorities Revise for Perfection Issues. Paragraph 2.1(c). The commenter recommended adding a reference to the fact that a guaranty of the AR Loan cannot be provided by the Owner (i.e., the HUD borrower) was added. (#11)

Comment: Lender Priorities: Revise for Perfection Issues. Paragraphs 2.1(d) and 2.1(e). A commenter recommended changes to conform the provisions to the definition of AR Lender Priority Collateral and Protective Advances. (#11)

Comment: Lender Priorities Revise for Perfection Issues. Paragraphs 2.2(a) and (b). Changes were made to make the provisions of subsections (a) and (b) consistent.

Comment: Revise the Timing of the Cut Off Time Paragraphs 2.3(a), 2.5(b), 2.6(b), and 2.9(b). In several paragraphs, the commenter made changes to reflect the fact that, in the new version of the form, the Cut-Off Time is 30 days after the giving of the Cut-Off Time notice, rather than at the time of giving of the Notice. (#11) The commenter stated that they believed that, even though the AR lender may recover from accounts receivable generated during that 30 day period, once a notice has been given, the AR lender's recovery should be limited to the Priority Obligations. The commenter stated that the changes were consistent with the first sentence of section 2.3(d).

Comment: Paragraph 2.3(f). A commenter recommended changes to clarify the language in order to prevent the FHA lender from being responsible for funds received by the Owner or Operator and to be consistent with section 2.5(g).

Comment: Paragraph 2.4(a) and 2.4(b). Changes were made to correct section references and make those paragraphs consistent.

Comment: Cover Priority Obligations Paragraph 2.6(b). As with several other provisions, the commenter changed the language to cover Priority Obligations arising after the delivery of a notice regarding the Cut-Off Time.

Section 2.7 AR Loan Documents

Comment: Define "Material Term." A commenter recommended that the defined term "Material Term" be set forth in the ICA and that the form ICA not rely on the lease to provide that definition. Even if the ICA is published as a "guide" and not a required form, it is intended to be a document that sets forth all material terms required as between HUD and the AR lender. Each lender must know what is considered a "Material Term" for purposes of the ICA. (#7)

Comment: Paragraph 2.7. A commenter stated that the AR lender should be on notice of the material terms of the AR Lender Loan Documents that cannot be amended without the consent of the FHA lender and HUD. The commenter stated that reference to documents to which the AR lender is not a party, such as the Operator Lease, will not provide such notice, particularly since such documents could be amended without AR Lender's knowledge or consent. Therefore, the commenter deleted the reference to Material Terms. The list of such materials terms of the AR Lender Loan Documents that may not be changed without the prior consent of FHA Lender and HUD should be set forth in the Agreement. The commenter stated that they believed that the listing of amendments that should require FHA lender consent, as set forth in section 2.7, is appropriate.

Comment: Paragraphs 2.9(a) and 2.9(b). The commenter stated that the references to "(other than such agreements to which FHA lender is a party)" was reinserted in these sections since the AR lender should not terminate DACAs or DAISAs without FHA lender's consent if FHA lender is a party to those agreements. The commenter also added sentences that, per the commenter, made it clear that (i) the AR lender would turn over to the FHA lender any payments on accounts attributable to services performed after the Cut-Off Time and (ii) FHA lender would turn over to AR lender any payments on accounts that constitute AR Lender Priority Collateral.

Section 3. Representations

Comment: Define "Terms of Art". A commenter recommended specifying terms of art in more detail as follows (#7):

(a) A commenter stated that a "springing lockbox" is a term of art that refers to a deposit account control arrangement whereby the secured party permits the depositor to have

access to the funds in the deposit account until such time as the secured party "springs" its control over the account. The commenter stated that it had been their understanding for several years that HUD in general does not permit this type of arrangement when AR financing is involved for a project. The commenter stated that they believed that retaining this descriptor in "Version 1" of Section 3.4 is inappropriate as it does not accurately summarize the mechanisms for payment of rents and other requirements set forth in the section, but is also misleading in that it implies that HUD will permit true "springing lockboxes" in AR financing mechanisms. The commenter strongly recommended that HUD consider using a different descriptor for this alternate version of this Section, for example, "Payments to FHA Lender".
(b). The commenter similarly, recommended that the descriptor for "Version 2" of Section 3.4, "Lockbox Account", utilizes a term of art that does not appropriately describe the requirements set forth therein. The commenter stated that a "lockbox account" is a term of art that was traditionally used to describe actual lockboxes into which a depositor's payors sent payments in the form of checks and other negotiable instruments. A bank then would access the physical lockbox, open items deposited therein and deposit them into a deposit account for the depositor. Depositors paid fairly hefty sums for such services by the depository bank. True lockbox arrangements are not often used in treasury management systems any longer as such mechanisms are made obsolete by modern automated clearing house ("ACH"), electronic funds transfers ("EFTs"), and wire payments used by payors. As such, the current descriptor used in "Version 2" of this Section is also inappropriate, and the commenter recommended that HUD consider using a different descriptor for this alternate version of this Section, for example, "Payments to Operator-Designated Account; Operator Payments to Owner".
(c) Finally, the commenter recommended that the descriptor for "Version 3" of Section 3.4, "Operator-Designated Account", should be modified accordingly, perhaps to "Payments to Operator Designated Account; FHA Debits from Operator Designated Account

Comment: Let payments be made directly to FHA lenders. Paragraph 3.4 (Version 3). A commenter stated that Version 3 should include an option for payments to be made directly to FHA lender by operator. This is a standard payment option selected by many Owners and Operators. In addition, many FHA lenders would prefer to not have an obligation to wire money to the Owner because they are not set up operationally to process such payments. Therefore, the commenter reinserted the language. The commenter also added language providing an option for the operator to make the rent payments to the Owner, which in turn will pay FHA lender. (#11)

Comment: Limit Operators ability to borrow on the AR Loan. Paragraphs 3.7 and 3.8. The commenter stated that these provisions dealing with limitations on AR Loans when there are multiple facilities covered by the AR Loan and discussing how a facility subject to a paid-off HUD Loan should be handled under the AR Loan are important protections for the FHA lender and HUD when multiple facilities are covered by one AR Loan. In particular, if the HUD Loans on a facility are paid in full at a

time at which other facilities are subject to HUD-insured loans, the operator of such facility should no longer be able to borrow on the AR Loan that encumbers the accounts receivable of the other facilities. (#11)

Section 4. Miscellaneous

Comment: Technical Clean up. Paragraph 4.2. The commenter recommended that the "entire agreement" language be deleted since it is redundant with section 4.15. (#11)

Comment: Notify the AR Lender of a Default. Paragraph 4.4(b). The commenter stated that the change makes use of the defined term "Event of Default" from the HUD Loan Documents. The commenter stated that they believed that this parallels the AR lender's notice obligation and that the AR Lender should be entitled to receive a notice of a default under the HUD Loan when the FHA lender gives notice to the Owner rather than at the much later time provided in HUD's current draft. (#11)

Comment: Section 4.14 Implementation of Agreement; Information; Further Assurances. A commenter stated that as stated in their coalition's comments of June 29, 2012, the proposed ICA contains a new provision authorizing the HUD lender to amend the AR lender's UCC financing statements. (#7) AR lenders' internal policies as well as those of our banking regulators would preclude most AR lenders from permitting this action. As AR lenders, the commenter strongly recommended a modification of this Section that permits AR lenders to maintain any UCC financing statements already on file but agree to a filing that states that the filing is "subject to" the ICA. As has been seen in recent years, HUD loans may be paid off before the expiration of AR loans and a HUD lender-filed amendment reducing the scope of an AR lender's lien could leave an AR lender unnecessarily exposed to subsequent creditors' claims on the borrower's assets.

Comment: Insert heading for Jurisdiction. Paragraph 6.10. The commenter stated that this paragraph is about jurisdiction and the heading should reflect that. (#11)

Master Lease Addendum (HUD 92221-ORCF)

Comment: Move Schedule 1 to be an Attachment to the Master Lease. A commenter recommended that Schedule 1, which identifies the various Landlord entities in a Master Lease should be an attachment to the Master Lease rather than an attachment to the Master Lease Addendum. (#11)

Comment: Schedule 1. Replace Approved Use. A commenter stated that "Approved Use" is defined as the use set forth on Schedule 1. (#11) Therefore, the commenter recommended that the "type of facility" and "the number of licensed units/beds" be replaced with the Approved Use in that schedule to facilitate HUD review, and to avoid ambiguity. The "Approved Use" may include independent living facilities, which are not licensed and would not otherwise be reflected.

Comment: Add a new Schedule 2. Schedule 2. A commenter stated that they believed that Schedule 1 includes too much information to be contained in one table. Divvying up that information between the two Schedules along the following lines is recommended: a description of the facilities, and a description of the loans. Since the landlord is the FHA borrower rather than the operator of a facilities, its name and should appear once, in Schedule 2, together with the principal amount of the Loan and the rent attributable to that facility. This will even out the contents of the two Schedules for formatting and review purposes, and provide a single location of the numbers that relate to the facilities, streamlining HUD review of the document.

Comment: Add a Joinder Agreement. A commenter recommended the use of a form of Joinder Agreement they previously submitted for the 60 day Notice with a letter dated June 29, 2012. (#8) The commenter recommended that this mechanism be referenced in the Master Lease Addendum and utilized to add additional Landlords as subsequent HUD Loans in the portfolio close and additional facilities are added to the Master Lease.

Comment: Revise the definition of the Operator Security Agreement to encompass the Non-Affiliated Operator. A commenter recommended changes for Assignment scenarios. (#8). The commenter recommended a Security Agreement between Operator and Landlord which gets assigned to the FHA lender.

Comment Correct typo in Section 6.: Payments and Impounds. A commenter recommended correcting the typo in the first sentence to read "…and shall at all times, be sized so as to allow for proper maintenance of the Healthcare Facility…". (#8) (Dropping an "at". Section 8)

Comment: Correct typo in Section 9: Ownership of Furniture, Fixtures, and Equipment (FF&E), and Transfer of Personal Payments. A commenter suggested correcting the last sentence in section 9(a) to read as follows: "Master Tenant will not lease FF&E from parties other than the Landlords that are required for licensure.

Comment Specify the Healthcare Facility in Section 9: Ownership of FF&E, and Transfer of Personal Payments. A commenter stated that since the term "facility" is not defined in the document, the

facility should be specified. (#8) The commenter recommended correcting the first sentence of section 9(b) to read as follows:

> "At the termination of the Master Lease and/or Sublease, the Landlord shall have the right to purchase the Master Tenant's or Operator's personal property located at each Healthcare Facility, at book value."

Comment: Use the term "Approved Use". A commenter stated that the paragraph requires that all permits, certifications, etc. that are required to operate the facilities for their "Approved Uses" be in place and maintained. (#11) Since "Approved Use" is defined elsewhere in the Addendum, the defined term should be used here rather than a more lengthy description. This will avoid inconsistency and allow for the fact that some skilled nursing and assisted living facilities are entirely private-pay, not receiving government funds, and some projects include independent living units.

ADDITIONAL ORCF DOCUMENTS

Healthcare Regulatory Agreement- Operator (HUD 92466A)

Capital Funding Operator Regulatory Agreement

Comment: Revise the Section to allow Distributions. Section 1 – Healthcare Facility Working Capital. The commenter stated that the current definition will have the effect of all but prohibiting distributions. (#11) Under Generally Accepted Accounting Principles, the portion of the principal of any loan that is due within one year is treated as a current liability. (#11) Therefore, 12 principal payments on the HUD-insured loan and, in many cases, all or a substantial portion of any AR financing, will be treated as a current liability, creating what an unintended result. The commenter proposed to exclude principal from the calculation unless the principal is past due.

Comment: Do not Treat Termination of Minor permits as cause for a Project Operating Deficiency Section 6(a). The commenter proposed several clarifications. (#11) In clauses (v) and (vi), the commenter recommended that the termination of a permit that is not needed to operate a project (e.g., loss of a curb cut permit where there are other acceptable access points) should not be treated as a Project Operating Deficiency, nor should a second survey failure be treated as a Project Operating Deficiency if the deficiency is minor.

Comment: Allow the operator to resume distributions once a violation is cured. Section 8(e). A commenter recommended that once a violation is cured, the operator should be permitted to resume distributions. (#11) The commenter stated that if read literally, HUD's version would prohibit any distributions after a Notice of Violation even after cure. This is unnecessary and probably unintended.

Comment: Make conforming Changes to Borrower's Regulatory Agreement Section 20. A commenter proposed changes to conform to changes proposed in the Borrower's Regulatory Agreement. (#11)

Comment: Narrow the definition of "Material Term" Section 22. The commenter stated that they believe the definition of "Material Term" is overly broad, unduly restricting the ability of operators to finance facility operations and creating unnecessary burdens on HUD asset management staff. (#11) The commenter suggested changes that they believed were reasonable and which protect HUD's interests while providing some flexibility (e.g., allow for a 20% increase or decrease in the maximum loan amount and allow for a 60-day period of a higher interest rate to provide time to seek HUD approval).

Healthcare Security Instrument (HUD-94000-ORCF)

Comment: Revise the Definitions: A commenter recommended the following definitions:

Section 1. DEFINITIONS:

"Assisted Living Facility" and "Nursing Home Facility." The commenter recommended deleting the additional qualifiers of the term "facility" as unnecessary. The definition of "Healthcare Facility" sufficiently qualifies the terms to mean those that are authorized to receive mortgage insurance pursuant to Section 232.

"Healthcare Facility Working Capital". Pursuant to Generally Accepted Accounting Principles "current liabilities" include any loan principal payable within twelve months. This means that a facility would need to have cash on hand to pay the following twelve months' of principal payments on its loans, but that none of this cash would be considered working capital. The commenter added to the definition of Healthcare Facility Working Capital what they considered an appropriate exclusion of the principal under the Note, and any AR Financing.

"Leases." The commenter deleted the qualifier that a ground lease be for the entire interest of the Borrower in the Land. It is possible that only a portion of the Land be held by the Borrower pursuant to a ground lease.

"Loan Documents" The commenter narrowed the definition to be consistent with that used in the Multifamily Housing program's Security Instrument. The definition was nearly all-inclusive, and incorporated too many items that should not be classified as loan documents, and are not provided to effect a security interest.

"Operator." The commenter stated that proposed CFR § 232.1003, stated that an eligible Operator shall be a single asset entity acceptable to FHA, except that the Commissioner may approve a non-single asset entity under certain circumstances. The commenter revised the language to allow for this second possibility. The term "management agreement" has the potential to cause confusion, as management agents are generally not operators unless they have an unusual amount of control of a project. The parenthetical was inserted to clarify that a management agent is not expected to be treated as an Operator, unless so specified in the firm commitment.

Subordination Agreement- Financing Section 232 (HUD-92420-ORCF)

Comment: Revise the Definitions.

Section 1. DEFINITIONS:

The commenter stated that they believed that the definitions set forth in the recitals should be incorporated into the agreement. (#11)

"Borrower" The commenter deleted "jointly and severally" as not applicable. Once the project and note are assigned, the assignor is no longer liable.

"Business Day" has been revised to be consistent with the Security Instrument HUD-92420-ORFC.

"Senior Lender" was deleted because it is defined in the first paragraph. The term inherently includes its successors and assigns, by virtue of the succession or assignment. Once the Senior Loan is assigned, the named lender is no longer party to the agreement; therefore "together with" and "jointly and severally" are not applicable.

MASTER LEASE DOCUMENTS

Master Lease Subordination, Non-Disturbance and Attornment Agreement.(HUD-92333-ORCF)

Comment: Restore Recitals and Execute separate Subordination Documents. A commenter stated that there is a conceptual problem with this document as drafted. (#11) The commenter stated that accepted practice to date, and a practice that the commenter suggested continue, is that a separate Master Lease Subordination, Non-Disturbance and Attornment Agreement ("SNDA") be executed by the lender, the Master Tenant, the applicable borrower who owns the Facility which is securing the subject HUD Loan, and by the Subtenant/Operator who operates that Facility, on a loan by loan basis. The draft document contemplates all Borrowers/Landlords and all Subtenants/Operators execute the same SNDA. That rarely if ever happens in practice because most HUD portfolio loans close over an extended period of time, with borrowers added to a Master Lease as the loan to each such borrower closes, with each

borrower, operator and the Master Tenant then signing a separate SNDA, as stated above. The commenter stated that this proposed form will not work in practice so the commenter strongly urged the restoration of the prior recitals referencing "Other HUD Borrowers", "Other Subleases", "Other Operators", and "Other Mortgage Loans".

Comment: Section 3, "Project Operating Deficiencies", is problematical. (#11)

Comment: Delete Provisions Regarding Financial Measures. A commenter recommended that Section 3(a)(ii) should be deleted in its entirety. (#11) The commenter stated that if an operator is paying its rent and operating its Facility adequately, without major regulatory problems, then HUD should not drill down to operator's negative working capital, debt service coverage, and aging of its accounts payable and accounts receivable.

Comment: Limit the Section to Denial of Payments. A commenter stated that Section 3(a)(iii) needs to be limited to a case where (i) there is an actual Denial of Payment, not a notice of a prospective Denial of Payment, and (ii) the situation is not remedied within one hundred twenty (120) days.(#11)

Comment: CMS Notices should not Trigger the Need for a Consultant. A commenter stated that in section 3(a)(v), it is standard CMS procedure to issue a notice of the proposed penalties if a substandard survey result is experienced. That proposal is not the same thing as a denial, a refusal to issue, or the actual termination of Permits and Approvals. Such notices from CMS are routine and should not be sufficient to trigger the need for a consultant; appeals and the like are available to the operator. (#11)

Comment: Revise the clause regarding Resurveying Visits. A commenter recommended that Section 3(a)(vi) be deleted. Second resurveying visits are not that uncommon and the non-compliance issue typically resolved. (#11)

Comment: Revise the 2 Business Day Notification. A commenter recommended that in Section 3(b), two (2) Business Days to provide notices is simply not long enough. The commenter suggested five (5) Business Days. (#11)

Comment: Expand the Cure Right. A commenter stated that Section 4 is critical to a Master Tenant and operator and it should only be limited or restricted in the event there is a "Material Risk of Termination" or a payment default under the lease (not the Loan Documents).(#11) This cure right should not be denied if a "Project Operating Deficiency" has occurred. The commenter stated that Project Operating Deficiencies occur, and can be addressed, and remedied. The commenter stated that operating

deficiencies do not result in the shutdown of a Facility and so they should not be used as a criterion for excluding the availability of this cure right. (#11)

Comment: Add Language to provide that a project operating deficiency is not an Event of Default. A commenter recommended that language be inserted in section 3 that reads as follows:

> "Except as otherwise expressly provided in the Master Lease or in the Sublease, the occurrence of a Project Operating Deficiency shall not be deemed an Event of Default under the Master Lease or the Sublease."

Healthcare Regulatory Agreement – Borrower.(HUD-92466-ORCF)

Comment: Provide for Release of funds in the Reserve for Replacement Account to the Borrower or Designee. A commenter recommended that Section 13(e) be revised to read as follows (#8):

> "Upon borrower's full satisfaction of its Obligations under the Loan Documents, any monies remaining in the Reserves for Replacement Account shall be released to borrower or its designee."

The commenter stated that frequently, the lease will provide that the tenant must fund Reserves for Replacements, the money the tenant funds may be used by tenant at the facility for repairs/replacements, and that at the end of the lease term, and/or the repayment in full of the HUD Loan, funds in the Reserves for Replacements are to be repaid to the operator.

Comment: Limit the applicability of Section 23 to situations where the Borrower is the Operator. A commenter recommended that HUD revise Section 23 should be included here only to the extent that the borrower is also the Operator. (#8) If there is a different operator, it is the entity acquiring goods and services and its Obligations are covered in other Loan Documents.

Comment: Eliminate HUD's ability to Mandate a Different Operator. Section 26(d). A commenter recommended that the section be revised by deleting Subclause (ii); that Subclause entitles HUD to mandate a different operator if it determines "the financial viability of the Healthcare Facility is at substantial and imminent risk".(#8) The commenter stated that this is a subjective determination and should be deleted. The commenter stated that if the borrower is paying its loan obligations, and the Permits and Approvals are not at material risk, then the borrower's rights to continue to operate the Project should continue.

Comment: Eliminate the prohibition on purchase options to operators. A commenter recommended that Section 26(e)(i) and (ii) be deleted. (#8) The commenter stated that the landlord should be free to grant the purchase option to an operator before, during, or after the lease term; there is no reason for that to be prohibited. The purchase option may be a key part of the economic deal when a lease is negotiated. Allowing the grant of a purchase option does not obviate the requirement that an operator who exercises the option must obtain HUD approval to assume the Loan, if that is what it intends to do. Similarly, there should be no problem with the operator having an ownership interest in the Project, subject to the operator having been qualified as an Owner under applicable HUD rules.

Comment: Allow the borrower to increase the operator's obligations. A commenter recommended that Section 34(n)(ii) should be revised to read as follows (#8):

> "(ii) materially increases the Obligations of borrower or the rights of the other parties to such contract of lease other than the operator."

The commenter stated that HUD should have no objection if the borrower increases the Operator's Obligations under the lease; that is only a benefit to HUD, not a detriment.

Comment: Provide additional flexibility for the Lender. A commenter recommended that a portion of section 36(c)(ii) be revised as shown:

> "…shall declare the whole of the Indebtedness due and payable and thereupon proceed with foreclosure of the Borrower's Security Instrument and/or the exercise of other remedies available to under the Loan Documents or at law or equity,(#8) …".

The commenter stated that HUD should not be able to direct the lender to foreclose if the lender believes the exercise of other remedies is more suitable. Using "and/or" in this phrase allows for that flexibility.

Comment: Add FHA as a Third Party Beneficiary. The commenter stated that the FHA should be added as a third-party beneficiary of section 38 of the Borrower's Regulatory Agreement.(#8) The commenter stated that this section imposes recourse liability to the principals of the borrower for certain "bad acts". The FHA should have the advantage of pursuing the principals who undertake that bad act. If not, the next most likely course of action then is assigning the defaulted HUD Loan to HUD, which is not a desired result. Were the FHA a third-party beneficiary of this provision, it could pursue the principals of the borrower for bad acts, obtain a recovery, and avoid having to assign the subject loan to HUD. The commenter stated that they knew from experience that HUD rarely if ever elects to pursue principals who have engaged in bad acts, such as relinquishing a license for a facility where the owners determine that the facility is not viable. The principals have no liability for that action if HUD does not pursue them yet the, who might choose to take back the property and avoid an assignment of the Loan to HUD, loses

recourse against the individuals. Adding the principal as a third-party beneficiary here only benefits HUD. The commenter strongly urged HUD to reconsider its position on this point.

Healthcare Regulatory Agreement – Operator. (ORCF 92223-ORCF)

Comment: Delete the requirement that an operator be liable for violations of the Agreement Prior to Termination. A commenter stated that the last sentence of the third introductory paragraph to this document that reads "However, operator shall be responsible for any violations of this Agreement which occurred prior to termination." should be deleted. (#8) If the Note is fully satisfied, and this is not a Master Lease situation, then violations of the Operator Regulatory Agreement should have zero effect on HUD or the lender after the Loan is repaid. This language can remain in the Master Tenant Regulatory Agreement and perhaps can remain here if there is a proviso that it applies only if the Operating Lease is subject to a Master Lease.

Section 3 Permits and Approvals:

Comment: Revise for Non-Affiliated Operators. A commenter stated that Section 3(b) needs to be revised where dealing with a Non-Affiliated Operator. In that circumstance, the Operator Security Agreement should secure the Lease Obligations and not the Loan Obligations, and if the operator is not in default, then its Permits and Approvals should not be conveyed, assigned, or transferred as determined by HUD.(#8). As stated above, this is a critical issue to a Non-Affiliated Operator. The Permits and Approvals are its assets which it should be allowed to use so long as it remains in good standing under its lease. A commenter recommended seeing the comments for Section 21, which also apply to this Section to the extent that this Section references Section 21.(#10)

Comment: The time frame in section 3(c) to deliver copies of notices, reports, etc. must be expanded beyond two (2) Business Days. A commenter suggested that the delivery time frame is simply not long enough. (#8) The commenter suggested 5 Business Days, and stated that HUD has rejected that suggestion, so the commenter recommended 4 Business Days. Another commenter recommended 3 business days. (#10)

Comment: Revise the time frame in section 3(c) to deliver copies of notices, reports, etc. to be expanded beyond two (2) Business Days. A similar change should be made in section 3(e) to the time frame for the delivery of financial and operating reports; it should be 4 Business Days after written request. (#10) Furthermore, reports that the lender or HUD request must be reasonably available to operator in order for the operator to provide them within that time frame. The commenter also suggested that any requests for such reports be in the lender‘s and HUD's "reasonable discretion". (#8)

Section 6: Consultants.

Comment: The commenter stated that the Project Operating deficiency Language will prove to be very problematical to operators, whether affiliated or not. The commenter stated that if it is included, then section 6(a)(ii), (v), and (vi) be deleted. Another commenter stated that the term "Project Operating Deficiency" is not defined (#10) and recommended that the entirety of item (ii) be eliminated from the final document. The commenter stated that such "covenants" are more appropriate in the lease addendum, as is currently practiced. Furthermore, the commenter recommended that item (iii) should be modified so that is reads that CMS "…issues a notice to Operator of an ***actual*** denial of payments by CMS…" This is to differentiate from a *potential* denial of payments, which is referenced in every form letter sent to an Operator by CMS, even when the likelihood of a denial of payments being implemented is minimal. Additionally, the commenter recommended that they believed that the word "proposed" should be removed from item (v), and that imminent loss of licensure should be added as a condition for engaging a consultant.

Comment: Revise the Section to Allow Flexibility. A commenter stated that if Section 6(a)(v) remains, strike the word "proposed". Similarly, in section 6(a)(iii), it should trigger the right to order a consultant only if there is an actual notice of denial of payments by CMS for new admissions and that denial is not released 120 days. (#8)

Section 8 Notice of Violation and Event of Default

Comment: Define the term "Event of Default." The commenter stated that the verbiage in this section is ambiguous.(#10)

Comment: Limit the Violations which cause Default. A commenter stated that the proviso in Section 8(a)(i) that "Borrower is timely satisfying all payment obligations in the Loan Documents" should not be a consideration for declaring a default and exercising remedies against an operator where the operator is timely paying rent and satisfying its Obligations under its lease.(#8) The commenter suggested revising that clause to read as follows: "(i) Operator is timely satisfying all payment obligations in the Borrower-Operator Agreement;".

Section 13, "Management Agreements"

Comment: Limit Applicability of the Management Agreement. Commenters stated that the management agreement should be applicable only in situations where the Manager is not affiliated with the operator.(#8,# 10)

Additionally, commenters recommended that the defined term "Material Term" be set forth in this document rather than relying on the lease to provide that definition. (#8, 10) The Regulatory

Agreement is utilized by all Operators and Lenders. Each party must know what is considered a "Material Term" for purposes of the Agreement.

Section 17: Commercial Nonresidential Leases

Comment: Extend the guidelines and modify the formula. Commenters stated that in Section 17, a five year Commercial Lease should be allowed and the reference to the 2% ceiling based on the Project's projected gross revenues should be deleted. (#8, 10) Existing guidelines allow for significantly greater percentages of projected gross revenues applicable to a Commercial Lease and so that limitation should be stricken so long as the Commercial Lease conforms to existing guidelines promulgated by HUD.

Section 18: Audits and Inspections

Comment: Audited financials should be ordered only in an Event of Default. A commenter stated that the language should be changed to indicate that audited financials on the operator can be ordered at the Operator's expense ***only in an Event of Default***, and that an Event of Default should also be defined if not previously defined. (#10) If a default concern is not present, an audit should not be required.

Comment: Include the ICA as a Loan Document. A commenter stated that the term Loan Documents is not defined, and thus it is unclear what items are considered "Loan Document."(#10) Additionally, the commenter stated that they did not understand why an Inter-Creditor Agreement ("ICA") is not considered a Loan Document. Most lenders' loan documents will provide that the ICA is actually a crucial loan document, borrowers' adherence to which is key for the AR lender's continued funding of the AR loan. The commenter further recommended that the ICA be considered a HUD Loan Document for those same reasons. Each of the AR lender and HUD lender risk losing the AR borrower's non-compliance with a requirement of the ICA as a default under their respective loans if the ICA is not considered an AR Loan Document and a HUD Loan Document.

Comment: Remove the last sentence, which requires that the Agreement be submitted to any of Lender or another third party, from the document in its entirety. (#10) A commenter stated that it is not prudent to expect an Operator to provide Loan Documents to any third party besides the Lender and HUD, especially without limitations as to what kinds of "third parties" this requirement applies, or under what circumstances this requirement applies. The commenter also expressed concern that this would result in an Operator's confidential records becoming available to the public via FOIA.

Section 20: Books, Accounts, Financial Reports, and Financial Covenants

Comment: Revise the mandates for Event s of Default. A commenter recommended that the last

sentence of section 20(d) should be revised to read as follows: "If there is a continuing Event of Default, and HUD has a reason to believe that particular Operator-Certified Statements may be unreliable…"(#8). HUD should not be able to mandate audited financial statements for an operator because of its belief in its unreliability if there is no continuing Event of Default. In Section 20(h), the commenter stated that "Loan Documents" is defined in this particular Agreement. Furthermore, HUD should not have the option to allow financial or operational reports to be submitted to any third-party.

Section 21: UCC Liens

Comment: Conform to the Operator Security Agreement. A commenter stated that Section 21 must be modified so as to make it conform to the comments above with respect to the Operator Security Agreement. (#8) Again, at a minimum, the Operator Security Agreement can secure the operator's obligations under the lease, not any Loan obligations of the borrower.

Healthcare Facility Note: (HUD 94001-ORCF)

Section 7 – Late Charges

Comment: Revise the Late Charge Requirements. The commenter stated that although 24 CFR 200.88 was revised in 2011 to change the time for assessing late charges from 15 days to 10 days for multifamily housing, the change does not apply to mortgages insured under section 232. (#11) Since the 2012 regulatory revisions did not address late charges, pursuant to 24 CFR 200.88(a)(2), late charges may be assessed on section 232 mortgages only if a payment is more than 15 days in arrears.

Section 20: Delete the Reference to Ginnie Mae as Inapplicable. A commenter stated that the reference to Ginnie Mae in this section is unnecessary and should be deleted as there are no other references to Ginnie Mae in the Note. (#11)

Comment Revise the Endorsement Panel for Technical Adjustments. The commenter revised the 223(a)(7) provision in the endorsement panel to correct the amendment language to the existing Contract of Insurance to include the FHA Firm Commitment issued with respect to the new loan.(#11) The commenter also eliminated the reiteration in this paragraph of the name of the borrower, and principal amount, since "this note" is not ambiguous. The commenter stated that this deletion will reduce the likelihood of inconsistencies and reduce logistical problems in the event that the loan amount changes after the borrower has signed the page. The commenter stated that they have had to have notes that have been signed by the borrower (and/or endorsed by HUD) destroyed and then have replacement notes signed due to last minute changes in the loan amount due to cost certifications.

Master Tenant Estoppel Certificate: (HUD-92339-ORCF)

Comment: Technical Revisions. A commenter recommended revising the name of the Master Lease and the salutation. (#11)

Surplus Cash Note (HUD-92223-ORCF)

Comment: HUD Should not Specify the Interest Requirements. Section 9. A commenter proposed deletion of section 9.(#11) The commenter stated that it should not matter to HUD whether or not interest is compounded on a surplus cash note since interest payments are made only from surplus cash or non-Project sources. (#11) Compound interest is a normal business practice and HUD should not intervene in business arrangements between private parties where HUD's interests are not at stake.

Comment: Permit Prepayments of Principal. The commenter recommended that prepayments of principal should be permitted from surplus cash as well as non-project sources.(#11) The commenter recommended that, HUD should not intervene in business arrangements between private parties where HUD's interests are not at stake.

Healthcare Regulatory Agreement – Master Tenant. (HUD-92337-ORCF)

The commenter stated that their comments with respect to the Operator Regulatory Agreement to the extent applicable to the Master Tenant, should be reviewed and applied to this document also. (#11) The commenter made several recommendations as follows:

Revise the language in the definition of "Reasonable Operating Expenses", by substituting the words "in compliance" for the words "and comply"(#11).

The comments with respect to the security interest granted by an operator in a Non-Affiliated Operator scenario, apply equally here to the security interest granted by the Master Tenant and the Security Agreement to be executed by the Master Tenant. It should secure only obligations of the Master Tenant under the Master Lease rather than obligations of the borrower under the Loan Documents.

Time frames for the delivery of financial statements, reports, surveys, and the like should be 4 Business Days, rather than 2 Business Days.

In Section 5(a)(i), the test here should not be whether the borrower is timely satisfying payment obligations in the Loan Documents, but rather whether the Master Tenant is timely satisfying all payment obligations in the Master Lease.

In Section 14(c), the proviso that reports for the final quarter of each year should be delivered within sixty (60) days of the end of the fiscal year should be extended to 90 days.

In Section 14(f), every time HUD has the right to request information or seek answers to questions, the Lender should be given the same right.

Section 15 needs to be revised to provide that the Master Tenant is granting a first lien security interest in its personal property as security for its Obligations under the Master Lease rather than for the obligations of the borrower under the borrower Note or any other Loan Documents.

In Section 16, Master Tenant can't "ensure" that all goods and services are purchased reasonably; this sentence could say that Master Tenant's Subleases shall require operators to purchase or acquire goods for the Project at costs that are deemed "Reasonable Operating Expenses".

Security Instrument/Mortgage/Deed of Trust.(HUD-94000-ORCF)

There are affirmative duties required of the Lender under this Security Instrument which makes it in effect a Loan Agreement. If the intent is to bind the Lender to these Obligations, which the commenter thought a borrower would want, then the Lender must be a signatory to this document. Conceivably, the signature can be limited to those provisions of the Agreement which include affirmative obligations of the.

Change the definition of "Event of Default" to read as follows:

"Event of Default" means the occurrence of any event listed in section 22 which is not cured within any applicable cure period provided in any of the Loan Documents and in any Subordination Agreement or Subordination, Non-Disturbance and Attornment Agreement."

The penultimate sentence of section 14(b) should be amended to read as follows:

> "Upon the occurrence of an Event of Default and throughout its continuation, the permission given to borrower pursuant to the preceding sentence to exercise its rights, power and authority under leases shall automatically terminate. Should such Event of Default be subsequently cured, then borrower's aforesaid permission shall be reinstated."

All references in this document that state "Buyer shall pay to" or "Buyer shall deposit" should be revised to include the term "or shall cause operator to pay to or deposit". As examples, see section 7(a), first line, section 7(b), first line, section 8(a), fifth line, and section 16(d)(iii).

The Lender has affirmative obligations under sections 8(b) and (c) which don't bind because it is not a signatory to this document. Similarly, section 10 includes affirmative Obligations of the Lender.

The “Cure Extension Clause” should be added to section 22(b)(iii).

Section 42 states that the Lender is not an agent of HUD, but there are many situations where HUD should want to designate the Lender as its agent. Rather than preclude it entirely with the existing language, the commenter suggested that the first sentence of section 42 be revised to read as follows:

> “The Lender is not the agent of HUD unless HUD has so designated and given written notice to borrower of such agent designation.”

Section 49, which provides for counterpart signatures, should reference that the Lender is signing the Agreement, in counterpart, accepting its affirmative Obligations expressly set forth in the Agreement.

Master Tenant Security Agreement (HUD-92340-ORCF)

General. The commenter recommended conforming changes throughout to be consistent with the provisions of the Operator Security Agreement, HUD-92323-ORCF, including among other things, substituting the term "Secured Party" with "Lender". The commenter (#11) recommended several changes as follows:

Introductory Paragraph and Section 2(a)(vii) – Location under UCC. The address of the Master Tenant for receipt of Notices in accordance with Section 17, not its "location" under the UCC, should be included in the introductory paragraph. (#11) The "location" under the UCC can be stated elsewhere (the commenter proposed Exhibit C) and will normally just be the Master Tenant's state of organization (unless the Master Tenant is a general partnership, a trust, a natural person or other "unregistered" entity).

Sections 1(b) and 1(c) – Healthcare Assets. Where possible, the commenter suggested inserting references to the Master Lease or Master Tenant in a location that avoids moving words like "and" or "or" around, consistent with the Operator Security Agreement. (#11)

Sections 1(d). The limitations on security interests, etc. should apply to all Healthcare Assets, including licenses, permits and approvals as we do not want the FHA loan transaction to trigger violations of state licensing laws. (#11)

Section 3(h) – Deposit Accounts. The commenter stated that as currently drafted, Section 3(h) significantly changes existing HUD policy regarding DACAs and DAISAs.(#11) Current HUD policy, as we understand it, requires a DACA or DAISA only for those accounts of the Master Tenant which receive facility revenues either directly or as a result of a transfer from a government receivables account pursuant to a DAISA. A DACA is not currently required for other deposit accounts of the Master Tenant (such as a savings account, central disbursement accounts and accounts not related to the Project). The commenter suggested adding a definition of "Deposit Accounts" that applies only to accounts that are required to be subject to a DACA or DAISA and then making conforming changes to the Agreement. The commenter did not use the defined term for several references to "deposit accounts" as the commenter believed that those references should apply to all of the Master Tenant's Capital accounts.

Section 21 and Attachment 1 – Assignment of Leases and Rents

Comment: Revise the Assignments: A commenter stated that the Assignment is missing customary provisions related to defaults, remedies and boilerplate provisions (such as jurisdiction and venue), much of which could be added using provisions of the Borrower's Security Instrument. (#11)

The commenter stated that Assignment of Leases and Rents should be a separate document rather than in the body of the Security Agreement. The commenter perceived no reason to treat it differently than the way it is treated in the Operator Security Agreement. Additionally, it is customary to record an Assignment of Leases and Rent, but not to record a Security Agreement in the land records.

Performance Bond – Dual Obligee (HUD 92452-ORCF)

Comment: Cap automatic increases of the penal sum. A commenter stated that Paragraph 3 of the Performance Bond states that the obligation of the Obligors is increased by any approved increase in the contract price. The commenter stated that this is problematic if it refers to increases of the penal sum of the bond. [3] The commenter stated that automatic increases of the penal sum present several concerns for the surety. Namely, the commenter stated concern that Federal regulations limit the risk a surety insurer can accept on a single bond written to the federal government, after crediting reinsurance and collateral, to 10% of its policy holder surplus (31 CFR 223.10 Limitation of risk).

The commenter stated that if HUD desires that the penal sum be increased commensurate with change orders, automatic increases should be capped. The commenter stated that the form could include, for example, a provision that permits an increase of the penal sum, without consent of the surety, to account for an aggregate increase of 15 % of the original contract price. The commenter stated that increases above this threshold would require surety consent. (# 2)

Comment: Limit the surety's risk by deleting the limitation that the surety notify the obligees of nonpayment and give the obligees a reasonable time to cure before the surety asserts nonpayment of the bond as a defense. A commenter stated that this sentence in Paragraph 5 expands the surety's risk because it places an additional obligation on the surety before it may assert the defense of nonpayment. The commenter recommended that the last sentence of Paragraph 5 be deleted. (#2)

Comment: Delete the provision prohibiting amounts paid to the Owner without the 's consent from reducing the bond penalty. The commenter stated that because the Lender and the Owner are co-obligees under the bond, any benefit afforded to the owner under the bond should be co-extensive with

[3] The "penal sum" is the amount in which the bond is issued or the "penalty amount" of the bond.

the Lender. Therefore, the commenter stated that the bond penalty should be reduced by a payment made in satisfaction of the surety's obligation, whether that payment is made to the Owner or Lender. The commenter stated that the last sentence of Paragraph 7 be deleted. (#2)

Payment Bond (HUD 92452-ORCF)

Comment: Cap automatic increases of the penal sum. Similar to comments filed on the performance bond-a commenter stated that Paragraph 2 of the Payment Bond states that the obligation of the Obligors is increased by any approved increase in the contract price. The commenter stated that this is problematic if it refers to increases of the penal sum of the bond. The commenter stated that automatic increases of the penal sum present several concerns for the surety. Namely, the commenter stated concern that Federal regulations limit the risk a surety insurer can accept on a single bond written to the federal government, after crediting reinsurance and collateral, to 10% of its policy holder surplus(31 CFR 223.10 Limitation of risk).

The commenter stated that if HUD desires that the penal sum be increased commensurate with change orders, automatic increases should be capped. The commenter stated that the form could include, for example, a provision that permits an increase of the penal sum, without consent of the surety, to account for an aggregate increase of 15 % of the original contract price. The commenter stated that increases above this threshold would require surety consent. (#2)

Comment: Delete the provision prohibiting amounts paid to the Owner without the Lender's consent from reducing the bond penalty. A commenter stated that because the Lender and the Owner are co-obligees under the bond, any benefit afforded to the owner under the bond should be co-extensive with the lender. Therefore, the commenter stated that the bond penalty should be reduced by a payment made in satisfaction of the surety's obligation, whether that payment is made to the Owner or. The commenter stated that the last sentence of Paragraph 7 should be deleted. (#2)

Further, the commenter stated that the last sentence of paragraph 7 suggests that the surety has obligations to the Lender under the Payment Bond. The commenter stated that as the Payment Bond is for the benefit of the subcontractors and suppliers that have not been paid by the contractor and have a right to make a claim under the Payment Bond. The commenters stated that any obligations to Lender are more appropriately secured by the Performance Bond.

Offsite Bond: - Dual Obligee (HUD 92479-ORCF)

Comment: Include clarifying language in the bond document to state that the surety cannot be expected to perform by either obligee if the owner is in breach of its payment obligations. A commenter

stated that the typical dual bond accomplishes two purposes. First, it adds the new entity to the bond as oblige, giving it all the benefits and rights that run to the obligee. Second, it clarifies that the surety's liability is not expanded by adding the new entity as oblige. The commenter stated that as the obligee is not a party to the construction contract between the contractor and the owner. The commenter stated that because the Lender is not a party to the construction contract, the Lender cannot be in default. The commenter stated that therefore, there is a question as to whether FHA can still require the surety to complete a project even when the owner has stopped paying the contractor. The commenter stated that a surety typically requires the dual oblige bond have clarifying language to state that the surety cannot be expected to perform by either obligee if the Owner is in breach of its payment obligations.

ADDITIONAL LEGAL DOCUMENTS

Guide for Opinion of Borrower's Counsel (HUD-91725-ORCF)

Comment Technical Revisions:

A commenter made several technical suggestions (#11)

- The salutation was revised to be consistent with the Estoppel certificates.
- List of Items Reviewed. The commenter added the FHA Commitment as item B, and as a "Loan Document".
- List of "Loan Documents": was revised to include additional escrows, the title policy, and the Request for Endorsement.
- The permits and approval list has been moved to later in the list. Some of the permits and approvals necessary to operate the property are held by the Operator rather than the Borrower, so they are supporting documents.
- In paragraph (h), the name of the general partner, managing member, etc. should be identified specifically. The commenter stated that they did not believe the generic reference to that entity to be sufficient.

Guide for Opinion of Operator's Counsel- Certification (HUD-92325-ORCF)

Comment: Technical Revisions.

The commenter made the following recommendations (#11):

- The salutation was revised to be consistent with the Estoppel certificates.
- A review of the organizational documents of any entity appearing in the signature block of the Operator, being necessary to support an opinion as to the binding effect of the Operator's execution of the document, those organizational documents the related good standing certificate, were added to the list of documents reviewed.

- The memorandum of lease was detached from the Regulatory Agreement, and moved to a separate line item, as a supporting document.
- The Certification of Operator was referenced consistently throughout.
- An opinion was added that all necessary authorizations have been obtained to operate the facility. The commenter stated their belief that this is an appropriate and necessary opinion to be included in the Opinion of Operator's Counsel. It is consistent with the same opinion given in the Opinion of Master Tenant's Counsel.
- Other changes have been made for clarity and to conform the Opinion of Operator's Counsel and that of Master Tenant's Counsel.
- The commenter believed the UCC as adopted in every state is now consistent regarding the filing of continuation statements; therefore the optional alternatives have been eliminated.

Guide for Opinion of Master Tenants Counsel Certification (HUD-92225-ORCF)

Comment: Technical Revisions. (#11)

- The salutation was revised to be consistent with the Estoppel certificates.
- The AR documents, DAISA, and opinions related thereto were deleted. It is highly unlikely that a Master Tenant would be party to AR financing, since the Master Tenant does not operate any facilities directly, or have any accounts receivable or government receivables. AR financing is most likely to be obtained by Subtenant/Operators. We believe the likely need for these opinions is too remote to include in the form opinion for Master Tenant's counsel.
- The certificate of an officer or manager pertaining to the completeness and accuracy of the organizational documents was moved to the paragraph listing those organizational documents, consistent with its listing in the Opinion of Operator's Counsel.
- Opinions are given relative to what is found in the UCC and Docket Searches. The commenter stated their belief that attaching the searches themselves to the opinion creates an unduly large volume of paper and should not be necessary.
- Other changes such as referencing Transaction Documents rather than all of the Documents have been made for clarity, consistency and to conform the Opinion of Master Tenant's Counsel and that of Operator's Counsel.
- It is common practice to rely on the Good Standing Certificate in opining as to the due organization and valid existence of an entity. Counsel will generally not be willing to give such an opinion without the ability to rely on an issued certificate from the state.

Exhibit A to Opinion of Borrower's Counsel-Certification (HUD-91725-ORCF)

Comment: Require the actual Entity. The commenter stated that the name of the actual entity should be required here, rather than a generic all-purpose descriptor. (#11) One signature should

suffice.

Cross Default Guaranty of Subtenants (HUD-91331-ORCF)

Comment: Ensure Guarantors are Responsible. A commenter recommended revisions to clarify that all guarantors are responsible under the Guaranty. (#11)

Estoppel Certificate (HUD-91117-ORCF)

Comment: Technical revisions. The commenter changed the defined name of the lease to "Operating Lease". (#11) This is a standard term, and the commenter stated their belief that this better reflects the nature of the lease than does "Operator Lease."

- The commenter moved the date of the certificate to the first page. Logistically, the documents must be signed prior to closing, and this will facilitate having the correct date should the closing be delayed for any reason after signing.
- The commenter moved "as of the date hereof" to the certification of the truth and accuracy of the statements on the signature page. The commenter stated their belief that it is more inclusive and declutters the certification language earlier in the document.
- Paragraphs 1(e), 1(g), 2(d), and 2(g). Each of these certifications contain a certification as to the truth and accuracy regarding the actions of the other party to the lease. The commenter inserted "to the best of . . . knowledge" because the one party cannot know for certain that the other party has or has not done what is mentioned.

Appendix of Commenters on

FR–5623–N–02 FHA Healthcare Facility Documents:
Revisions and Updates and Notice of Information Collection; 30-Day Notice

Robert J. Duke	Surety & Fidelity Association of America	HUD-2012-0123-0002
Robert J. Duke	Surety & Fidelity Association of America	HUD-2012-0123-0003[4]
Lauren Rexroat	Capital Finance, LLC.	HUD-2012-0123-0007
Jack Fenigstein,	Fenigstein& Kaufman	HUD-2012-0123-0008
Gary Sever	Capital Funding, LLC	HUD-2012-0123-0010
Charles C. Bissinger, Jr.,	Vorys, Sater, Seymour and Pease, LLP	HUD-2012-0123-0011
Charles C. Bissinger, Jr.,	Vorys, Sater, Seymour and Pease, LLP	HUD-2012-0123-0012
Charles C. Bissinger, Jr.,	Vorys, Sater, Seymour and Pease, LLP	HUD-2012-0123-0013

[4] Comments 4, 5, 6, and 9 were transferred to another document folder, as the comments were on another Federal document on which comments were being sought but the comments were inappropriately posted to this document folder.